
(1992) 09 CAL CK 0018
In the Calcutta High Court
Case No : W.A. No. 50 of 1989

Bajrangbali Engineering Co. Ltd.

APPELLANT

Vs

Amar Nath Sircar and Others

RESPONDENT

Date of Decision : 25-09-1992

Acts Referred:

Companies Act, 1956 — Section 433

Citation : (1995) 83 CompCas 435

Hon'ble Judges : Prabir Kumar Majumdar, J;Ajoy Nath Ray, J

Bench : Division Bench

Advocate : P.K. Das, K.J. Sengupta and Tilak Bose, for the Appellant; Tapas Banerjee and S.P. Majumdar, for the Respondent

Final Decision : Allowed

Judgement

Ajoy Nath Ray, J.—This is an appeal from an order admitting the winding-up application made by the three executors of one Mriganka Mohan Sur, deceased on November 3, 1983.

2. The basis of the winding-up application is three decretal debts for which ex parte decrees from the Howrah Subordinate Court were obtained on January 30, 1986, February 6, 1986, and February 10, 1986, for alleged wrongful occupation of certain lands by the company.

3. The said Mriganka Mohan Sur had transferred by a deed of gift dated May 6, 1981, the entire ownership in the said lands along with the rights and benefits of the litigations pending in respect thereof to a certain trust, called the Sarat Chandra Sur Jana Kalyan Charitable Trust, of which the accepting donees of the gift were three trustees, being three sons of Mriganka Mohan Sur.

4. On February 25, 1986, these trustees again transferred the interest to one Bajrangbali Market Association and admitted in the registered deed of transfer that the company was not in actual physical possession and as such the three suits for mesne profits were not maintainable, and that the said three decrees

were fraudulent decrees obtained by suppression of these facts, and also fraudulent because on the date of decree the hereditament had already stood transferred (see pages 44 and 60 of paper book I).

5. A few days before the second transfer, when the three suits had been decreed, the executors of Mriganka Mohan Sur were the only persons continuing the action. The said decrees were all ex parte decrees.

6. At one stage in one of the three suits the donee trust was substituted as plaintiff. But such substitution was removed and the executors of Mriganka Mohan Sur were substituted in their place, (see page 68 of paper book I).

7. The company has come up and said that the ex parte decrees were passed in favour of utterly wrong persons as Mriganka Mohan Sur had divested himself of his interest during his lifetime. The executors of Mriganka Mohan Sur were no more entitled to obtain a decree in spite of such transfer than Mriganka Mohan Sur himself would have been entitled to, had he been alive at the date of passing of the decrees.

8. Mr. P. K. Das, appearing for the company appellant while challenging the order of admission of the winding up petition in the court below, has cited several decisions for the proposition that the existence of a money decree is not necessarily conclusive for the company court to proceed thereupon and treat the decretal debts as binding without any further query to be raised thereupon.

9. The following cases were cited in this regard :

In Re: Ko-Ku-La Ltd., Official Receiver, Kanpur and Another Vs. Abdul Shakur and Others, , Om Prakash Mohta Vs. Steel Equipment and Construction Co. (P.) Ltd.,

It is an undeniable proposition of law which emerges from these cases that the civil court granting the decree does not thereby bind either a court in bankruptcy or a winding-up court. The rationale is that a debt, which succeeds in the causing of a declaration of bankruptcy, or in the causing of initiation of the process of winding-up of a company, enures to the benefit or prejudice of not only the creditor in question, but of all other creditors and contributories, as the case might be, and at the same time causes civil death of the individual bankrupt or the wound up company, again, as the case might be, third parties are involved. Thus, the winding up court goes behind the decree wherever serious questions are raised about the decree having been obtained by fraud or collusion, or where there is a serious allegation about the lack of jurisdiction of the court passing the decree, or where a serious miscarriage of justice might, according to the winding-up court, occur, if the decretal debts were permitted to be used as a tool for winding up.

10. Bankruptcy courts and winding-up courts are courts of representative action. Individual interests are adjudged not in isolation but as having a bearing upon other interests too, not all of which are at all times represented before the court judging the particular matter in hand. The official liquidator, the principal

subordinate officer of the company court, does not admit to proof decretal debts which might have been collusively suffered by the company for unwarranted gain of the corporate managers. No official liquidator can disallow a debt which has been treated by the company court itself as so indisputable as to cause the admission and advertisement of a winding up petition. Thus, the company court scrutinizes with double caution the debt which is to be the beginning of the end.

11. It has been held in *Fraser, In re* [1892] 2 QB 633 that even if an application to have a judgment in a civil suit set aside has been refused, and the said refusal has been affirmed in the Court of Appeal, even in that case, the decretal dues can be gone behind by the company court. So also in the case of even a consent judgment in *Lennox, In re* [1885] 16 QBD 315. It has also been held that even if unconditional leave to defend an action has been granted, the company court might yet admit a winding-up application on the said same debt ; *Welsh Brick Industries Ltd., In re* [1946] 2 All ER 197 (CA).

12. The position at law well settled both in England and in India, therefore, is that a winding-up court on its own goes behind the decree in the aforesaid serious circumstances, and if it is itself dissatisfied, then it does not permit a winding-up application to proceed, leaving the parties to work out their rights in execution proceedings in the ordinary civil courts.

13. In the instant case, the transfers are not really disputed. It was argued in the court below on behalf of the petitioning creditors and accepted by his Lordship there, that even if the petitioning creditors succeeded in getting money, they would hold it for the benefit of the beneficiaries, be it the Jana Kalyan Trust or be it the Barjangbali Marketing Association. (See Supp. paper book (II) pages 29, 69 and 74). However, these beneficiaries are nowhere in the picture before us, nor were they before the trial court at any point of time whatsoever.

14. If the executors are permitted on their own in their self-styled capacities as trustees of Jana Kalyan or Bajrangbali to put the decrees into effect against the company, there is still a serious risk that the actual beneficiaries might come again and ask for a payment over again saying that no authority of theirs was at all shown to the court whereby their debt could be recovered by the executors of Mriganka Mohan Sur.

15. Or, the beneficiaries might simply not be wanting payment of their debt. If they do not want it, if they show no wish to enforce it, why should anybody else recover it on their behalf ? A wrong person happening to hold property of another might well in the eye of law become an accountable trustee ; but that is no reason to allow any and every one to recover debts due to others, because in the eye of law the recovering party would become an accountable trustee.

16. In our opinion, the possibility is one where there could be a serious miscarriage of justice, by allowing a wrong and unauthorised person to recover the debt. Nor is there any material before us to show that if any payment is received by the petitioning creditors, they are either in communication with the

ultimate beneficiaries or under agreement with the ultimate beneficiaries to hand it over to them in some predetermined and tangible mode or manner.

17. A further point arises that in the company court even upon admission of the petition, the petitioning creditors would not get any payment. The payment, if any, they would get before the official liquidator if and when the company is actually ordered to be wound up and the debt is accepted as proved before the official liquidator. But, as soon as the winding up petition is admitted and advertised, the damage to the company's reputation will be done, even if the matter for passing a final winding up order still remains to be decided.

18. The question of the petitioning creditors holding any money in trust for any beneficiary immediately upon the winding up petition being admitted does not arise. Under these circumstances the dicta of a Division Bench of this court in the case in *Rai Charan Mondal v. Biswanath Mondal*, [1914] 20 CLJ 107 ; AIR 1915 Cal 103, would not be wholly to the point.

19. In that case, it was held that a decree passed in favour of a plaintiff, who had partly transferred his interest in the suit, was not an improper decree. It was mentioned by Sir Ashutosh Mukherjee delivering the judgment in the middle of page 109 (of CLJ) that for a part of the decree the transferring plaintiff was still the real plaintiff. Under those circumstances, it was held that the full decree in favour of the plaintiff was not an improper one and it was further held that the plaintiff would hold the benefit of the rest of the decree for the transferee beneficiaries. But here, if the winding up application is admitted and advertised, of what will the petitioning creditors be trustees ?

20. Even if a decree is not improper in the above sense, it still might appear to the winding up court that admission of the petition on the basis thereof retains the possibility of serious miscarriage of justice. I have indicated why I think that such possibility exists. The law enabling and requiring the company court to go afresh into doubtful matters has also been discussed.

21. It has been held in the decision of the Judicial Committee in AIR 1939 170 (Privy Council) that a party who has wholly assigned his interest in continuing the suit cannot ask for judgment. It has also been held at least by one of the learned judges (Bhagwati J.) in *Jugalkishore Saraf v. Raw Cotton Co. Ltd.* AIR 1955 SC 376, that a decree, as soon as passed stands transferred for all beneficial purposes to the transferee, in case the plaintiff has transferred his whole interest pending litigation. Another learned judge held in that case that all interest passes, but the decree itself does not pass short of a written assignment. Thus it cannot but be held that at least the entire equitable interest in the decrees were with Jana Kalyan or Bajarangbali, and not with the petitioning creditors. As holders of the decree, those creditors might have certain rights to proceed in the court of execution, but those rights, short of the beneficial rights, are insufficient for a winding up court.

22. It has been held in the case of *Bowes v. Hope Life Insurance and Guarantee*

Society [1865] 1 HLC 389 by the House of Lords in 1865 (see Ram Kumar Agarwala and Another Vs. Buxar Oil and Rice Mills Ltd. and Another, that a creditor who is entitled both at law and in equity to the debt can present a winding up petition and if the debt is indisputable an order has to be made. In the instant case, the beneficial ownership of the decree, at least, was admittedly not with the petitioning creditors and accordingly presentation of the winding up application solely at their instance was not justified. No other point was pressed for winding up except the point about the non-payment of decrees.

23. Various cases were also cited by Mr. Das for the proposition that a bona fide disputed debt cannot be the subject-matter of a winding up application, but it is not necessary to deal with the same in the facts and circumstances of this case.

24. Mr. S. P. Majumdar, appearing for the petitioning creditors, stated that two of the trustees of the Jana Kalyan Trust were also two of the executors of Mriganka Mohan Sur. We find no substance in the point because the trust itself was the donee and the trustees themselves were not the donees. As such the coincidental identity of two of the persons is not a legally relevant point.

25. Mr. Majumdar also argued that on a construction of the deed, the benefits of these three litigations were not assigned, but only those of the earlier ones. We find no substance in this contention as the words in the deed of gift are sufficiently wide and general for these three suits to be also included therein.

26. Mr. Majumdar also argued that u/s 122 of the Transfer of Property Act acceptance of the donees is necessary. Such acceptance is found in the deed itself at page 87 of the first pail of the paper book.

27. Apart from relying upon the aforesaid case reported in Rai Charan Mondal v. Biswawth Mondal [1914] 20 CLJ 107 ; AIR 1915 Cal 103, Mr. Majumdar also relied upon the case of a learned single judge in Krishan Sharma Vs. Shital Prasad, In that case, it has been held that even after devolution of interest inter vivos the appropriate provision for substitution would be Order 22, Rule 3 and not Order 22, Rule 10. With the greatest respect I am unable to agree. It is well known that if the plaintiff has wholly parted with his interest during litigation -- even during his lifetime -- the transferee can apply to be substituted in place of the plaintiff. Thus, after the plaintiff's death his heirs and legal representatives could not have a greater right than the plaintiff himself possessed during his lifetime.

28. Mr. Majumdar also relied upon the case reported in Shakti Chand Vs. Chamaru and Others, which is a Division Bench judgment. The case decides, amongst other things, that an application by a transferee under Order 22, Rule 10 is not a must but if he does not take diligent steps, then the progress of the suit by the plaintiff still on record might well bind such transferee. In the instant case, neither Jana Kalyan Trust nor Bajrangbali Market Association has come up and said that they are in some way aggrieved by the decree nor have they said that they are pleased with the decree and want them to be executed by the

executors of Mriganka Mohan Sur. This, whether the decree would bind the beneficiary trust or the beneficiary market association, is a point not germane to the issues before us.

29. Under those circumstances, I feel compelled to set aside the order admitting the winding-up petition in the court below. The said petition shall stand dismissed but without any costs as the petitioning creditors have proceeded in capacity as trustees for the estate of Mriganka Mohan Sur and I do not find their action to be mala fide.

30. The bank guarantee given by the company shall forthwith be discharged and returned to the company by the learned Registrar, O. S., within a period of a fortnight from the date hereof. The appeal is thus allowed in the above terms.

31. The learned Registrar, O. S., the bank involved in the bank guarantee and all others concerned are to act on a signed copy of the operative portion of this judgment and order.

32. Stay of operation of this order is asked for but the same is refused.

Prabir Kumar Majumdar, J.

33. I agree.