(2015) 04 JH CK 0058

In the Jharkhand High Court

Case No : Writ Petition (C) No. 3482 of 2014

Balwinder Singh APPELLANT

Vs

Rajendra Singh Chahal and Others RESPONDENT

Date of Decision : 09-04-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 9
Companies Act, 1956 — Section 391, 442, 446, 446(1), 537

Citation : (2015) 4 AJR 16 : (2015) 3 JLJR 192

Hon'ble Judges : S. Chandrashekhar, J

Bench : Single Bench

Advocate : V. Shivnath, Senior Advocate, for the Appellant; Indrajit Sinha, Advocates for the Respondent

Final Decision : Dismissed

Judgement

S. Chandrashekhar, J.—Aggrieved by dismissal of application under Section 446 of the Companies Act, 1956 filed in Title Suit No. 90 of 2004 seeking transfer of the Title Suit to Calcutta High Court, the present writ petition has been filed.

2. The brief facts of the case are that, an agreement of sale dated 20.02.1996 was executed by M/s. Protective Saving and Finance Limited through its Managing Director namely, Manindra Nath Mukherjee in favour of Balwinder Singh. Another registered deed of sale dated 04.05.1998 was executed by M/s. Protective Saving and Finance Limited through its Director namely, Sunil Kumar Saha in favour of Rajendra Singh Chahal. The petitioner namely, Balwinder Singh filed Title Suit No. 60 of 2000 against M/s. Protective Saving and Finance Limited and others seeking specific performance of agreement of sale dated 20.02.1996. The said suit was decreed on 13.08.2002 directing M/s. Protective Saving and Finance Limited and others to execute sale deed in respect of property comprised in agreement of sale dated 20.02.1996. In the meantime Company application Nos. 1-46 of 1997, 1-18 of 1998 and 1and 2 of 1999 were filed before the Company Law Board, Eastern Region Bench at Calcutta. The Reserve Bank of

India also passed an order restraining M/s. Protective Saving and Finance Limited from accepting deposits from any person. On 13.10.2003, notice was issued by the Official Liquidator to Sunil Kumar Saha, the director of the company. Thereafter, Title Suit No. 90 of 2004 was filed by the Rajendra Singh Chahal-respondent No. 1 against the petitioner and M/s. Protective Saving and Finance Limited has also been made proforma defendant No. 2 in the suit. The case of plaintiff-respondent No. 1 is that the decree obtained by the petitioner in Title Suit No. 60 of 2000 is fraudulent, void, illegal and inoperative. It is stated that in company petition No. 442 of 2002 the Official Liquidator was appointed on 21.07.2003 by the Calcutta High Court. Since the company has gone in liquidation and the matter is sub-judice before the Calcutta High Court, the petitioner filed application dated 06.01.2014 seeking stay of other proceeding in Title Suit No. 90 of 2004 with a further prayer to transfer Title Suit No. 90 of 2004 to the Calcutta High Court. Application dated 06.01.2014 filed by the petitioner seeking transfer of Title Suit No. 90 of 2004 has been dismissed by the trial Court vide order dated 20.05.2014.

3. Heard the learned counsel for the parties.

4. Mr. V. Shivnath, the learned Senior counsel appearing for the petitioner referring to Section 446 of the Companies Act submits that, the object of Section 446 is to save the company from unnecessary litigation and from multiplicity of proceedings. The provision under Section 446 of the Companies Act has been engrafted for compelling the creditors and others to prove their claims in the winding up proceeding and for achieving the said purpose, all suits and proceedings pending against the company are stayed. The learned Senior counsel for the petitioner submits that, the company is defendant No. 2 in Title Suit No. 90 of 2004 and therefore, without leave of the Calcutta High Court in Company Petition No. 442 of 2002, the respondent No. 1 could not have filed the said suit and the said suit cannot proceed. It is further submitted that, the expression "any proceeding" occurring in Section 446 of the Companies Act would include a suit also and therefore, in view of the embargo under Section 446 of the Act, no suit against the company can be filed in any Court without leave of the Calcutta High Court. Relying on the decision in Dwarka Prasad Agarwal (D) by Lrs. and Another Vs. Ramesh Chandra Agarwala and Others, AIR 2003 SC 2696 : (2003) 96 CLT 568 : (2003) 117 CompCas 206 : (2003) 4 CompLJ 385 : (2003) 3 CTC 184 : (2003) 5 SCALE 131 : (2003) 6 SCC 220 : (2004) 49 SCL 25 : (2003) 1 SCR 376 Supp : (2003) AIRSCW 3328 : (2003) 4 Supreme 497 , the learned Senior counsel re-enforces his argument that "leave of the Court" is the condition precedent for instituting any proceeding against the company.

5. As against the above, Mr. Indrajit Sinha, the learned counsel for the respondent No. 1 submits that, Title Suit No. 90 of 2004 instituted by the respondent No. 1 is not a suit "by or against the company" and thus, embargo under Section 446 of the Companies Act is not attracted. Title Suit No. 90 of

2004 has been filed seeking a declaration that judgment and decree dated 13.08.2002 in Title Suit No. 60 of 2000 has been obtained by playing fraud by the petitioner. In the said suit the respondent No. 1 has not claimed any relief against the company. It is further submitted that, provision under Section 446 of the Companies Act applies in cases in which realization of dues and/or discharge of liability of the company is the subject matter of the suit. Relying on decisions in Nahar Industrial Enterprises Ltd. Vs. Hong Kong and Shanghai Banking Corporation, (2009) 10 JT 199 : (2009) 10 SCALE 360 : (2009) 8 SCC 646 : (2009) 12 SCR 54 and Dhruv Green Field Ltd. Vs. Hukam Singh and Others, AIR 2002 SC 2841 : (2002) 3 PLR 472 : (2002) 5 SCALE 487 : (2002) 6 SCC 416 : (2002) 1 SCR 449 Supp : (2002) AIRSCW 3227 : (2002) 5 Supreme 257 , the learned counsel for respondent No. 1 submits that, even in cases of express or implied ouster for jurisdiction of civil courts, the court retains jurisdiction to adjudicate the plea of fraud taken by the plaintiff seeking a declaration that order/decree is nullity.

6. Referring to prayer made in application dated 06.01.2014 the learned counsel for respondent No. 1 submits that, the application itself was not maintainable. Per contra, Mr. V. Shivnath, the learned Senior counsel appearing for the petitioner submits that, in view of Section 446 of the Companies Act, the trial court has no jurisdiction to proceed further in Title Suit No. 90 of 2004.

7. Before adverting to the rival contentions, it is important to examine the object of Section 446 of the Companies Act, 1956. Section 446 of the Companies Act runs thus;

"446. Suits stayed on winding up order:- (1) When a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, against the company, except by leave of the [Tribunal] and subject to such terms as the [Tribunal] may impose.

(2) [Tribunal] shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of -

(a) any suit or proceeding by or against the company;

(b) any claim made by or against the company (including claims by or against any of its branches in India);

(c) any application made under Section 391 by or in respect of the company;

(d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or rise in course of the winding up of the company,

Whether such suit or proceeding has been instituted or is instituted or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960 (65 of 1960).

(4) Nothing in sub-section (1) or sub-section (3) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court."

8. The aim and object of Section 446 appear to safeguard the properties of the company and to prevent wasteful litigation in the matters which can be expeditiously decided by the Company Court. It has been held that while granting leave under Section 446, the Court takes into consideration whether the Company is likely to be exposed to unnecessary litigation and costs. In Harihar Nath and Others Vs. State Bank of India and Others, (2006) 2 BC 538 : (2006) 131 CompCas 119 : (2006) 4 CompLJ 433 : (2006) 3 CTC 520 : (2006) 4 JT 241 : (2006) 143 PLR 638 : (2006) 4 SCALE 43 : (2006) 4 SCC 457 : (2006) 67 SCL 234 : (2006) 1 UJ 443 , the Hon''ble Supreme Court has held thus;

"18. The object of Section 446 of the Act is not to cancel, nullify or abate any claim against the company. Its object is to save the company which has been ordered to be wound up, from unnecessary litigation and from multiplicity of proceedings and protect the assets for equitable distribution among its creditors and shareholders. This object is achieved by compelling the creditors and others to come to the court which is winding up the company and prove their claims in the winding up. For this purpose, all suits and proceedings pending against the company are also stayed subject to the discretion of the winding-up court to allow such suits and proceedings to proceed. When a winding-up order is passed, the effect is that all the affairs pertaining to the company in liquidation, including all suits/proceedings by or against the company, come within the control and supervision of the winding-up court. The winding-up court has to decide whether it will let the suit/proceeding to continue in the court where it is pending, or it will itself adjudicate the suit/proceeding. Thus, under Section 446(1), the winding-up court only decides about the forum where the suit has to be tried and disposed of...."

9. Relying on the "Harihar Nath" case, the learned Senior counsel for the petitioner submits that without seeking leave of the Companies Court, Title Suit No. 90 of 2004 filed by the respondent No. 1 cannot proceed. In Title Suit No. 90 of 2004, the plaintiff-respondent No. 1 has claimed himself the rightful owner and absolute title holder over the suit property mentioned in Schedule-A. In one part of the suit property described as Schedule-B, the present petitioner was month to month tenant under M/s. Protective and Finance Limited-defendant No. 2. The plaintiff claims that after purchase of the suit property vide registered sale deed dated 04.05.1998 from the company, he issued notice dated 20.07.2000 calling upon the petitioner to hand over vacant possession of the tenanted premise described in Schedule-B. The plaintiff-respondent No. 1 has averred that the suit scheduled property has been mutated in his name in Mutation Case No. 649 (III) 99-2000/(II)(III)/2000-01 by order dated 24.01.2000 and correction slip and rent receipts have been issued in the name of the plaintiff. It is further stated that on 03.09.2000, the plaintiff filed Title Eviction Suit No. 7 of 2000 against the petitioner who evaded appearance in the suit. He filed written

statement with counter claim on 12.09.2002 in which he disclosed that Title Suit No. 60 of 2000 has been decreed ex-parte on 13.08.2002 against the company and Manindra Nath Mukherjee, Abhimanyu Singh, Smt. K.P. Majumdar etc. The plaintiff has alleged that the present petitioner filed Title Suit No. 60 of 2000 against the dead persons. The defendants namely, Manindra Nath Mukherjee and Smt. K.P. Majumdar had already died at the time of filing of Title Suit No. 60 of 2000. The plaintiff has relied on the report of the Jail Superintendent dated 13.01.1998 in G.R. No. 2728 of 1996. Defendant namely, Smt. K.P. Majumdar died on 28.12.1998 at Calcutta whereas, Title Suit No. 60 of 2000 was filed on 27.06.2000. It is further averred that the plaintiff purchased the property after obtaining necessary permission from the competent authority. The property was sold vide Company''s Resolution dated 30.03.1998 and in the light of direction dated 05.02.1998 and 24.04.1998 of the Hon''ble High Court in Cr. Misc. No. 7244 of 1997 (R) the decision to sell the property was taken. In the above facts, the plaintiff-respondent No. 1 sought declaration that the judgment and decree dated 13.08.2002 in Title Suit No. 60 of 2000 was obtained by fraudulent means on the basis of forged and fabricated agreement dated 20.02.1996 and the same is nullity, illegal, inoperative, void-ab-initio and not legally enforceable and binding upon the plaintiff.

10. Now, the question arises whether, in view of Section 446 of the Companies Act, 1956 the jurisdiction of the Court of Sub-Judge, Dhanbad, is barred and whether without seeking leave of the Calcutta High Court in Company Petition No. 442 of 2002, Title Suit No. 90 of 2004 cannot proceed? In Kamala Mills Ltd. Vs. State of Bombay, AIR 1965 SC 1942 : (1965) 57 ITR 643 : (1966) 1 SCR 64 : (1965) 16 STC 613 , a Constitution Bench of the Hon''ble Supreme Court has held that "the question about the exclusion of the jurisdiction of civil courts either expressly or by necessary implication must be considered, in every case, in the light of the words used in the statutory provision on which the plea is rested, the scheme of the relevant provisions, their object and their propose." As noticed above, in "Harihar Nath" case it has been held that the object of Section 446 of the Act is not to cancel, nullify or abate the claim against the company. Its object is to save the company from unnecessary litigation and from multiplicity of the proceeding besides, protecting the assets of the company for equitable distribution among its creditor and shareholders. In Lala Ram Swarup and Others Vs. Shikar Chand and Another, AIR 1966 SC 893 : (1966) 2 SCR 553 , it has been held that "the bar excluding the jurisdiction of the civil courts cannot operate in cases where the plea raised before the civil court goes to the root of the matter and would, if upheld, lead to the conclusion that the impugned order is a nullity." In Dhruv Green Field Ltd. Vs. Hukam Singh and Others, AIR 2002 SC 2841 : (2002) 3 PLR 472 : (2002) 5 SCALE 487 : (2002) 6 SCC 416 : (2002) 1 SCR 449 Supp : (2002) AIRSCW 3227 : (2002) 5 Supreme 257 , the Hon''ble Supreme Court has held thus:

"10(3). Even in cases where the jurisdiction of a civil court is barred expressly or impliedly, the court would nonetheless retain its jurisdiction to entertain and adjudicate the suit provided the order complained of is a nullity."

11. In Ram Prasad (dead) by LRs. and others Vs. Assistant Director of Consolidation and others, AIR 1994 SC 2733 : (1994) 3 JT 519 : (1994) 2 SCALE 771 : (1994) 2 SCC 228 Supp : (1994) 3 SCR 231 , it was found that Section 242 of U.P. Tenancy Act, 1939 bars the jurisdiction of the civil courts however, a suit was filed seeking a declaration that the decree granted under Section 59 of the U.P. Tenancy Act, 1939 was vitiated by fraud and collusion. The Hon''ble Supreme Court held that, "admittedly, such a relief, when cannot be given by the revenue courts, the suit undoubtedly becomes maintainable under Section 9 of the CPC. It is also by now well settled that the matters exclusively cover under the special statute does not attract the provision of the Companies Act". In S.V. Kondaskar, Official Liquidator and Liquidator of the Colaba Land and Mills Co. Ltd. Vs. V.M. Deshpande, Income Tax Officer, Companies Circle I(8), Bombay and Another, AIR 1972 SC 878 : (1972) 42 CompCas 168 : (1972) 83 ITR 685 : (1972) 1 SCC 438 : (1972) 2 SCR 965 , it has been held that, the assessment proceeding for computing the amount of tax must be held to be such other legal proceedings as can be started or continued without the leave of the liquidation Court under Section 446 of the Companies Act. In Industrial Credit and Investment Corporation of India Ltd. Vs. Srinivas Agencies and Others, (1996) 86 CompCas 255 : (1996) 5 JT 405 : (1996) 2 SCALE 774 : (1996) 4 SCC 165 : (1996) 2 SCR 960 , the Hon''ble Supreme Court has held that the Recovery of Debts Due to the Banks and Financial Institutions Act, 1993 confers exclusive jurisdiction on the Tribunal and the Recovery Officer, in respect of debts payable to the Banks and Financial Institutions and there can be no interference by the Company Court under Section 442 r/w Section 537 or under Section 446 of the Companies Act, 1956. In Dwarka Prasad Agarwal (D) by Lrs. and Another Vs. Ramesh Chandra Agarwala and Others, AIR 2003 SC 2696 : (2003) 96 CLT 568 : (2003) 117 CompCas 206 : (2003) 4 CompLJ 385 : (2003) 3 CTC 184 : (2003) 5 SCALE 131 : (2003) 6 SCC 220 : (2004) 49 SCL 25 : (2003) 1 SCR 376 Supp : (2003) AIRSCW 3328 : (2003) 4 Supreme 497 , it has been held that if a dispute is not under the provision of the Companies Act, the jurisdiction of the civil court is not ousted.

12. In the present case, the plaintiff-respondent No. 1 has pleaded fraud on the part of the petitioner and has sought a declaration that the judgment and decree dated 13.08.2002 in Title Suit No. 60 of 2000 has been obtained by playing fraud. Such a dispute is not a dispute covered under the provisions of the Companies Act. Moreover, the Company Court is not required to adjudicate the said issue because there is no allegation of fraud against the company. In fact, the Company Court cannot perform the function of the civil court in so far as, the dispute and relief sought in Title Suit No. 90 of 2004 are concerned. In "S.V. Kandeakar v. V.M. Deshpande" case, it has been held that the Liquidation Court cannot perform the function of income tax officer. Furthermore, I find that in Title Suit No. 90 of 2004, the plaintiff-respondent No. 1 has not sought any relief against the company-defendant No. 2. The company had already suffered a

judgment and decree dated 13.08.2002 in Title Suit No. 60 of 2000 and thus, it has no subsisting interest in the suit scheduled property. The present writ petition have been filed by the decree-holder and not by the company. The learned counsel for the respondent No. 1 has rightly contended that it is the liquidator who can object to the proceeding against the company in any court and not a stranger like the petitioner. The contention of the learned Senior counsel for the petitioner that since company is defendant No. 2 in Title Suit No. 90 of 2004 and any order passed in the said case would be binding upon the company and therefore, the suit cannot proceed without the leave of the Calcutta High Court in Company Petition No. 442 of 2002 cannot be accepted. As noticed above, in the Title Suit No. 90 of 2004 no relief has been sought against the company. The plaintiff has averred that the company through its authorised Director, namely Sunil Kumar Saha has executed registered sale deed dated 04.05.1998 thus, the plaintiff - respondent No. 1 is protecting his right, title and interest in the suit scheduled property flowing to him from the sale deed dated 04.05.1998. At the time when Title Suit No. 90 of 2004 was filed, the suit scheduled property did not belong to the company and in fact, it had already suffered a decree which is not challenged by the company, prior to winding up proceeding and thus, bar under Section 446 of the Companies Act, is not attracted.

13. In view of the above discussion, I find no merit in the writ petition and accordingly, it is dismissed.

