

(1959) 11 KL CK 0021

In the High Court Of Kerala

Case No : Civil Miscellaneous Petition No's. 2241, 2280 and 2437 of 1959

B.V. John and Others

APPELLANT

Vs

Coir Yarn and Textiles Ltd.

RESPONDENT

Date of Decision : 23-11-1959

Acts Referred:

Companies Act, 1956 — Section 446, 446(1)

Industrial Disputes Act, 1947 — Section 10, 25FFF(1)

Citation : AIR 1960 Ker 247 : (1960) 30 CompCas 162 : (1960) 1 LLJ 311(1)

Hon'ble Judges : Raman Nayar, J

Bench : Single Bench

Advocate : K.N. Narayana Nair and N. Sudhakaran, in C.M.P. No. 2241 of 1959, K. Velayudhan Nair and V. Subramonian Moothathu, in C.M.P. Nos. 2280 and 2437 of 1959, Mani J. Meenattor and N. Anantha Krishna Iyer, for the Appellant;

Final Decision : Partly Allowed

Judgement

Raman Nayar, J.—Two common questions arise in these applications brought by 49 "workmen" and the legal representative of a deceased workman of the company in liquidation under Sections 460(6) of the Companies Act, 1956 read with Rule 155 of the Travancore-Cochin Company Rules against the partial rejection of their proofs by the Official Liquidator. The first is, whether the compensation payable to these workmen on the termination of their services is to be determined under Sections 25F(b) of the Industrial Disputes Act, 1947, free of the limitation imposed by the proviso to Sections 25FFF(1) as claimed by them, or whether it is subject to that limitation as held by the liquidator. The second is, whether the award made by the Industrial Tribunal, Alleppey on 5-8-1957 on a reference under Sections 10 of the Industrial Disputes Act (and published under Sections 17, in the Gazette dated 27-8-1957) of a dispute between the company and those of its workmen as come under the category, "staff members", is void for the reason that no leave of this court was taken under Sections 446 of the Companies Act for the continuance of the proceedings after the winding up order and the liquidator is therefore entitled to ignore that

award.

2. The business of the company was the manufacture and sale of coir and coir products. In 1953, 1954 and 1955 it suffered heavy loss owing, it is said, to adverse trade conditions, the loss in 1952 being phenomenal and amounting to halt its "paid up capital. In June 1955, the Board of Directors of the company decided that the company should go into voluntary liquidation and resolved that necessary steps be taken for the purpose. A general meeting was called for the purpose, but owing to certain supervening complications including a court injunction, the meeting could not be held and winding up was eventually ordered by this court on 24-7-1957 on a petition presented by a contributory on 19-12-1956. Meanwhile, on 24-12-1956, the official liquidator had been appointed provisional liquidator, and he took charge of the company on 3-1-57 and continued in charge of it as provisional liquidator until, on the winding up being ordered, he became the liquidator.

Even before the provisional liquidator took charge, the company had, with a view, to closing down, dispensed with the services of the bulk of its workmen on payment of compensation as on closure of business. When the provisional liquidator took charge, he found that there were some accepted orders pending execution with the company as also unfinished goods and raw materials. He thought it would be beneficial to continue the working of the company for the limited purpose of executing the pending orders retaining only the workmen necessary for the purpose and discharging the rest. After obtaining orders of court, he terminated the services of 23 workmen on 17-1-1959, retaining only 17 for the purpose of executing the pending orders. On 11-6-1957, when the pending orders were nearing completion, he dispensed with the services of 6 more workmen, and the services of the remaining 11 he terminated on 24-7-1957, on the passing of the winding up order.

3. The dispute leading to the reference under Sections 10 of the Industrial Disputes Act related, among other things, to annual increments which the management had refused since 1952 and to strike wages. The reference was first made to the Industrial Tribunal, Trivandrum in October 1954 and, on the constitution of the Industrial Tribunal Alleppey, to that Tribunal in June 1956. Soon after the appointment of the provisional liquidator, the Staff Association representing the workmen filed two petitions before the Tribunal, one to implead the provisional liquidator as a party to the dispute and the other to take action against him for having dispensed with the services of some of the workmen without the permission of the Tribunal.

On receiving notice of these petitions the provisional liquidator moved this court, and, on 1-4-1957, this court made an order staying all proceedings with regard to them. Regarding the reference itself, this court passed no orders since the application of the provisional liquidator was confined to the two petitions filed against him, and it observed that it was not concerned with the continuation of the adjudication of the reference. It declined to express any opinion on the

argument advanced on behalf of the Staff Association that Sections 446 of the Companies Act had no application to such proceedings. The proceedings before the Tribunal went on without the Official Liquidator participating in them either in his capacity as provisional liquidator or as liquidator, although, of course, he had notice of the proceedings. By the award, the workmen were given increments as also wages during the strike period. But, as we have seen, in adjudging their proofs, the liquidator has ignored the award.

4. The first question does not present much-difficulty. The case of the workmen is that the termination of their services was a retrenchment falling within Sections 25F of the Industrial Disputes Act and that they are entitled to compensation of 15 day's average pay for every completed year, of service under Clause (b) of that section without any other upper limit. In any view of the matter, the undertaking was closed down only on 24-7-1957 when the last of the workmen was discharged, and there can be no question of applying Sections 25FFF to any workman discharged before that date. Even to those workmen who fall within Sections 25FFF, the upper limit of three months' pay Imposed by the proviso to Sub-section (1) of that section cannot apply, because the closure in this case was not on account of unavoidable circumstances beyond the control of the employer within the meaning of the explanation to that proviso.

5. It seems to me that the case of all the workmen comes within the proviso to Sections 25FFF(1), The closing down of an undertaking need not be, and rarely is, all on a sudden and a matter of an instant; it can be, and often is, in stages and spread over some time. It cannot be disputed that, by 1955. the company had suffered such heavy losses; and the general trade outlook was so gloomy that it had little chance of survival; and indeed, the petition for winding up was based on the ground that the very substratum of the company was gone. It was in these circumstances that the Board of Directors, in whom the management vested, decided in June 1955 that the business be closed down and the company go into voluntary liquidation.

It was in pursuance of this decision that the company gradually reduced its business, and, with the sanction of the Industrial Tribunal (with regard to the 22 staff members involved in the dispute) dispensed with the services of the bulk of its workmen. This, I think, was the first stage of the closing down. The next stage was when. On taking charge, the provisional liquidator decided to stop: the business except with regard to the execution of pending orders, and, after obtaining Orders of the court, dispensed with the services of 23 workmen on 17-1-1957 and of 6 more workmen on 11-6- 1957. The final stage by which the closure was completed, was on 24-7-1957 when, on the passing of the winding up order, the Liquidator discharged all the remaining workmen.

6. I take the view that the termination of the services of all the petitioners was on the closing down of the undertaking. And, from the facts stated above, it should be clear that this closure was on account of unavoidable circumstances beyond , the control of the employer within the meaning of . the proviso to -S.

25FFF (1) of the Industrial Disputes Act. There is nothing to show that the company was responsible for the adverse trade conditions which made it impossible for it to continue --in fact it would appear that the company was depending solely on foreign buyers and that its business fell, owing to import restrictions imposed by the countries concerned. In the end, the company had to be compulsorily wound up, and there is no allegation that the winding up petition was fraudulent or collusive. In the circumstances, it can scarcely be said that the undertaking was closed down by reason merely of financial difficulties or financial losses.

7. The liquidator was right in limiting the compensation payable to the petitioners to three months' average pay.

8. The Tribunal's award is concerned only with those of the petitioners who are styled "staff members" -- the factory hands, the workmen proper, were not parties to the dispute. The reference of the Tribunal was in June, 1956; the appointment of the provisional liquidator, was in December, 1956; the winding up order was in July, 1957; and the award was in August, 1957. On the wording of Sections 446(10) of the Companies Act, 1956, which, in this respect, makes a significant departure from the language of Sections 171 of the Act of 1913, the appointment of the provisional liquidator does not affect the continuance of a pending proceeding, and leave of the winding up court is required only for commencing a new proceeding. But, once a winding up order is made, even the continuance of a pending proceeding can only be by leave of the Court and subject to such terms as the court may impose. If the section were applicable to proceedings before an Industrial Tribunal, I have little doubt that all the proceedings of the Tribunal after "24-7-1957. including the award, would be void" for want of the required leave.

I am not impressed with the argument advanced on behalf of the petitioners that Section 446 only imposes a prohibition and does not lay down as a consequence that proceedings in violation of the prohibition shall be void. I cannot agree that for the consequences of a violation, we have to go to Sections 537, that Section 537 is complementary to Section 446, and that a proceeding which does not come within the mischief of Section 537 is good notwithstanding that it is in transgression of Section 446. Section 537 is supplementary to Section 446; the two cover different, though to some extent, overlapping ground; and to accept the argument would mean that Section 446 is an altogether idle provision because to the extent it is covered by Section 537, it is redundant, and to the extent that it is not so covered it is ineffective. When the law says that a suit or other legal proceeding shall not be commenced or proceeded with, it necessarily follows that anything done in disobedience of this injunction has to be ignored. It is as if it were not done at all. The prohibition in Section 446 of the Companies Act seems to me similar to those in Sections 195 - 199 of the Criminal Procedure Code, and no express provision to that effect; is necessary to show that proceedings in violation of the prohibition are void.

9. It has been argued on behalf of the liquidator on the strength, of certain observations in *Pipraich Sugar Mills Ltd. Vs. Pipraich Sugar Mills Mazdoor Union*, that the Industrial Disputes Act can apply only to an existing and not to a dead concern. It is true enough that the Act does not apply to a dispute arising after an undertaking has been closed down or with reference to the closure, "but that does not mean that a subsequent closure can affect a proceeding properly initiated under the Act. The very decision relied upon states that notwithstanding a closure, the machinery provided by "the Act would continue to be available for working out any rights accrued prior to the closure.

As pointed out therein, if that were not so, an employer could escape the consequences of what I might call industrial misconduct by the simple expedient of a closure, and his workmen would be left without remedy in respect of the rights given to them by the Act. I see no basis for the argument that, once a company running an industry is ordered to be wound up and has therefore to close down, Sections 446 of the Companies Act must gain ascendancy over the provisions of the Industrial Disputes Act in the determination of disputes between the company and its workmen.

10. In my opinion, Sections 446 of the Companies Act can have no application to proceedings pursuant to a reference u/s 10 of the Industrial "Disputes Act. Giving the term, "other legal proceedings" appearing in Sub-section (V, of the section, the wide meaning given to the same term in the corresponding section, Sections 171, of the 1913 Act in AIR 1946 16 (Federal Court) and not confining it by an ejusdem generis construction to proceedings analogous to a suit, I still think that to come within the scope of this section, the proceeding must be in the nature of an action against the property of the company.

To put it somewhat differently, the proceeding must be for the enforcement of something in the nature of personal right against the assets of "the company and not one in vindication of public interest. As pointed Out in the Federal Court decision just referred to, the purpose of Sections 446 of the Companies Act is to subject all creditors to the control of the Court in respect of their actions against the property of the company so that the property may be conserved and applied in the pari passu satisfaction of its liabilities. The winding up court has to see that the administration is carried on to the best advantage of the creditor's and the members of the company as a whole, and, for that purpose, Sections 446 and other sections of the companies Act give it wide powers so far as the rights of the creditors and the members of the company are concerned.

But, if there are interests that transcend the interests of the creditors and members of the company, it is not reasonable that these interests should be subjected to the control of the winding up court a control which it is to exercise for the benefit of the creditors and the members. A criminal prosecution against the company would doubtless be a legal proceeding against it. But I do not suppose that it has ever been said that a criminal prosecution falls within the scope of Sections 446(1) of the Companies Act. And it seems to me that Sub-

sections (2) and (3) of Section 446(1) give some indication of the kind of letral proceeding that comes within the mischief of Sub-section (1). For Sub-section (2) gives the winding up court jurisdiction to entertain or dispose of any suit or proceeding by or against the company, while Sub-section (3) gives it the power to withdraw and dispose of any such suit or proceeding pending in any other court.

I am inclined to think that a suit or proceeding for which leave is necessary under Sub-section (1) must be a suit or proceeding capable of being withdrawn and disposed of by the winding up court. In *Kaluram Daga Vs. Emperor*, it was observed that Section 171 of the 1913 Act was a provision intended to safeguard the company's assets against wasteful or expensive litigation in regard to matters which are capable of determination more expeditiously and cheaply in the winding up. With due respect I agree,

11. The Industrial Disputes Act, needless to say, is conceived in the public interest. Its object is to ensure fair terms to workmen and to secure industrial peace, so that the economy might not suffer. Although an adjudication under the Act might have the result of giving individual workmen personal rights against the property of the owner of the undertaking, be it an individual or a company, its purpose is not really that, but "to settle the industrial dispute. Obviously, the purpose is something before which the personal interests of the creditors or members of the company concerned must yield, just as, for example, they must be-, fore a criminal prosecution or a proceeding under Sections 145 of the Criminal Procedure Code.

If we turn next to Sections 10 of the Industrial Disputes Act, we find that, as pointed out in *S.K.G. Sugar Ltd. v. All Hassan* AIR 1957 Pat 722 the section makes it obligatory on the appropriate Government to make a reference in cases falling under the proviso to Sub-section (1) or under Sub-section (2) of the section. Even the "may" of the body of Sub-section (1), it seems to me, gives a power coupled with a duty, and, where in its opinion the necessary conditions exist, the appropriate Government is under public duty to make a reference. The statute imposes the duty solely on the appropriate Government, free of any outside control, and apart from that, if this duty were subject to control u/s 446 of the Companies Act, it might become well nigh impossible of performance, it would be strange if a duty that has to be performed in the public interest were to be controlled in order to serve the private interests of the creditors and members of a company running an industrial establishment.

12. With great respect, I am in agreement with the view taken in AIR 1957 Pat 722 that a reference under Sections 10 of the Industrial Disputes Act is not subject to the provisions of Sections 171 of the Act of 1913 which is Sections 446 of the current Act. And, once a reference is made, Sections 15 of the Act imposes on the Tribunal, the duty of holding its proceedings expeditiously and submitting its award to the appropriate Government as soon as it can, From all that I have said earlier, it necessarily follows that the proceedings before the Tribunal cannot

be subject to Sections 446 of the Companies Act.

13. I might add that it seems to me extremely doubtful whether the adjudication of an industrial dispute to which a company is a party can be described as a proceeding against the company so as to attract Sections 446 of the Companies Act. Also that as pointed out in the Patna case just referred to, it was not necessary that the liquidator should be a party to the proceeding to make the award binding on the company. The company continues to exist even after the winding up order, and from the facts of the present case, it is apparent that the liquidator cannot complain that he was given no opportunity to represent the company before the Tribunal.

14. I am not. unaware that the decision in AIR 1957 Pat 722 was reversed on appeal to the Supreme Court (The decision is reported in S.K.G. Sugar Ltd. Vs. Sri Ali Hassan, Chairman, Industrial Tribunal, Bihar and Others, but the reversal was on an altogether different point, and on the question whether a reference under Sections 10 of the Industrial Disputes Act was a legal proceeding against the company falling within the scope of Sections 171 of the Indian Companies Act 1913 (in other words, of Sections 446 of the Companies Act 1956) their Lordships expressly stated that they would prefer, not to express any opinion.

15. At p. 501 of Buckley on the Companies Acts (13th Edn.), it is stated with reference to the section of the English Act of 1946 corresponding to Sections 446 of our Companies Act, that a statutory enquiry cannot be stayed under this section. To the same effect are the observations of Rajamannar C. J. in R. G. M. Price v. M. Chandrasekaran AIR 1951 Mad 987 that, " Section 171 of the Companies Act would have no application to enquiries, investigations and orders made either by Government or statutory bodies in exercise of statutory powers." In Kaluram Daga Vs. Emperor, a Division Bench of the Calcutta High Court took a similar view with reference to an enquiry under Sections 145 of the Cr. P. C. All these support the proposition that a proceeding in performance of a statutory duty is not controlled by Sections 446 of the Companies Act, although I must confess that I have been unable to recognise this . proposition in In re the Pontypridd and Phondda Valley Tramways Co. Ltd. (1889) 58 LJ Ch 536 which is often cited as the source of its authority.

16. The liquidator has canvassed the correctness of the award. But this is not a matter which can be gone into so long as there is no allegation that the award was obtained by fraud or collusion. (See Mrs. A. Ananthalakshmi Ammal, by power-of-attorney holder, A. Ramachandran Vs. The Hindustan Investment and Financial Trust Ltd.,

17. Regarding the actual terms of the award,, there is some controversy. According to the liquidator, it grants increments only from 1952 to 1954, but according to the petitioners, it grants increments from 1952 to 1957. On issue 1, which relates to the question of increments, the Tribunal said at one place that it had no hesitation in finding that the company was not justified in withholding the

increments (due under a general agreement) from 1952 onwards and it further said that a statement filed on behalf of the workmen showing their salary in 1951 and the increments due from 1952 to 1957 was not challenged by the management. Then, in considering whether the increments should be granted with retrospective effect, it proceeded to hold that, "all the members of the staff who were in service from 1952 onwards are entitled to get their increments with retrospective effect for three years, i.e., from 1952 till the end of 1954." The liquidator would have me read this as meaning that no increments were granted after 1954. But I have no doubt that that is not the meaning. The true meaning is that the workmen concerned are entitled to increments from 1952 to 1957 in accordance with the statement filed on their behalf. (And so that becomes the basis on which average pay has to be determined at the time of the closure for the purpose of assessing the compensation payable under Sections 25FFF). But, arrears of, tray based on the revised salary arrived at after allowing the increments will be given only for the three years 1952, 1953 and 1954; or, in other words the grant of the increments is to have retrospective effect only for these three years.

18. I allow the petitions to the extent indicated in this order. The petitioners will within a week from this date, file before the liquidator, statements showing the amounts due to them under the several heads in accordance with this order. The liquidator will verify the statements and file them into court within a week thereafter, and, in case of disagreement, file a separate statement showing the amounts due according to him. The liquidator will pay the petitioners their costs from out of the assets of the company. Advocate's fee Rs. 50/ in each petition.