
(1966) 03 SC CK 0028

In the Supreme Court Of India

Case No : ?Appeal (civil) 569 of 1965

Harinagar Sugar Mills Ltd.

APPELLANT

Vs

M.W. Pradhan

RESPONDENT

Date of Decision : 21-03-1966

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1

Citation : AIR 1966 SC 1707 : (1966) 36 CompCas 426 : (1966) 60 ITR 508 :
(1966) MhLj 1089 : (1966) MPLJ 1084 : (1966) 3 SCR 948

Hon'ble Judges : V. Ramaswami, J;K. Subba Rao, J;J. M. Shelat, J

Bench : Full Bench

Final Decision : dismissed

Judgement

Subba Rao, J.—The facts that gave rise to this appeal may be briefly stated : On January 3, 1933, Messrs. Harinagar Sugar Mills Ltd., hereinafter called the Company, was incorporated under the Indian Companies Act, 1913 (Act 7 of 1913). Narayanlal Bansilal was the Chairman of the Board of Directors of the Company. He was also the karta and manager of the joint Hindu family consisting of himself, his sons and daughters. As such karta he purchased a large block of shares of the Company from and out of the funds of the joint family. The said family also owned a sugarcane farm at Harinagar in the State of Bihar. On March 8, 1956, Narayanlal Bansilal and his three sons sold the said farm to the Company for a sum of Rs. 40,00,000. Under the sale-deed the Company agreed to pay the price in instalments. Though the Company paid a few instalments, a sum of Rs. 25,00,000, still remained to be paid by it to the joint family. In July 1961, one of the sons of Narayanlal Bansilal filed Suit No. 224 of 1964 on the Original Side of the Bombay High Court against his father and others for partition of the joint family properties. Pending the suit, on October 20, 1961, the Court, in exercise of its powers under Order XL, rule 1, of the Code of civil Procedure, appointed a Court Receiver as Receiver of all the joint family properties. Long prior to the filing of the said suit for partition, on July 24, 1956, the Additional income tax Officer, Section V, Central Bombay, issued a notice to the Company u/

s 46 of the Indian income tax Act, 1922, prohibiting it from paying the debt due by it to the joint family and calling upon it to pay the said amount to the income tax authorities towards income tax due from the said joint family. After the Receiver was appointed, on June 29, 1962, the said Receiver issued a notice u/s 434 of the Indian Companies Act calling upon the Company to pay the amount, due from it to the joint family, with interest to the Additional Collector of Bombay towards the income tax dues of the family and also informing it that, in case the said payment was not made within 21 days of the receipt of the notice, proceedings for winding up of the Company under the Indian Companies Act would be taken. As the Company did not comply with the terms of the said notice, the Receiver moved the High Court for directions and obtained an order on November 22, 1963, authorizing him to file a petition for winding up of the Company. After obtaining the permission of the Court, on January 10, 1964, the receiver filed a petition in the High Court for winding up of the Company. After hearing the objections filed by the Company, Kantawala, J., admitted the petition and directed advertisements to be given in the newspapers and in the Government Gazette mentioning his order. The Company preferred an appeal against that order and that was heard by a Division Bench consisting of Patel and Tulzapurkar, JJ. The learned Judges dismissed the appeal. Hence the present appeal, by special leave.

2. Mr. N. C. Chatterjee, learned counsel for the appellant-company, raises before us the same contentions which were advanced unsuccessfully on behalf of the company in the High Court. We shall deal with the said contentions seriatim.

3. The first contention of the learned counsel is that the Court Receiver had no power to file a petition in the Court for winding up of the Company. Elaborating this contention the learned counsel contends that under Order XL, rule 1(d), of the CPC a court can only confer on a Receiver the power to bring a suit and that the expression "suit" does not take in a petition for winding up of a company.

4. Order XL, rule 1, of the CPC reads :

"Whether it appears to the Court to be just and convenient, the Court may by order -

. . . .

(d) confer upon the receiver all such powers, as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Court thinks fit."

5. In exercise of the said power, the Court appointed the respondent as the Court Receiver on October 20, 1961, of the properties belonging to the joint family in the suit. The material part of the order reads :

"..... IT IS FURTHER ORDERED that the Court Receiver be and is hereby

appointed Receiver of the properties belonging to the joint family in suit and all the books of accounts papers and vouchers with all necessary powers under Order XL Rule 1 of the CPC including power to vote and/or exercise all the property rights in respect of shares belonging to the joint family in the several joint stock companies mentioned in the plaint including power to file suit....."

6. Under this order, all the necessary powers under Order XL, rule 1, of the CPC were conferred upon the Receiver, including the right to file suits. Assuming that a petition for winding up of a company is not a suit within the meaning of Order XL, rule 1(d) of the said Code, the other powers mentioned therein are comprehensive enough to enable the Receiver to take necessary proceedings to realise the property of and debts due to the joint family. Can it be said that the petition filed by the Receiver for winding up of the Company is not a mode of realisation of the debt due to the joint family from the Company ? In Palmer's Company Precedents, Part II, 1960 Edn., at page 25, the following passage appears :

"A winding up petition is a perfectly proper remedy for enforcing payment of a just debt. It is the mode of execution which the Court gives to a creditor against a company unable to pay its debts."

7. This view is supported by the decisions in *Bowes v. Hope Life Insurance and Guarantee Co.* (1865) 11 H.L.C. 388, *Re General Company for Promotion of Land Credit* (1870) L.R. 5 Ch. D. 380 and *Re National Permanent Building Society* (1869) L.R. 5 Ch. D. 309. It is true that "a winding up order is not a normal alternative in the case of a company to the ordinary procedure for the realisation of the debts due to it"; but nonetheless it is a form of equitable execution. Propriety does not affect the power but only its exercise. If so, it follows that in terms of clause (d) of rule 1 of Order XL of the Code of civil Procedure, a Receiver can file a petition for winding up of a company for the realisation of the properties, movable and immovable, including debts, of which he was appointed the Receiver. In this view, the respondent had power to file the petition in the Court for winding up of the Company.

8. That apart, under O. XL, r. 1(d), of the CPC the Court can also confer on the Receiver such of those powers as the Court thinks fit. It is implicit in this apparently wide power that it shall be confined to the scope of the Receiver's administration of the estate. If, for the proper and effective management of the estate of which the Receiver has been appointed the Court thinks fit that it shall confer power on the said Receiver to take steps for winding up of the debtor-company, it must be conceded that the Court will have power to give necessary directions to the Receiver in that regard.

9. On November 22, 1963, the Receiver obtained the directions of the Court empowering him to file the winding-up petition against the Company. But, it is contended that the learned Judge made that order without prejudice to the

contentions of the members of the joint family and that one of the contentions was that a petition for the winding up of the Company was not maintainable at the instance of the Receiver. This reservation, no doubt, entitles the appellant to raise the plea of the maintainability of the petition by the Receiver for winding up of the Company. But it does not bear on the question of authorization obtained by the Receiver to file the said petition. The question of the maintainability of the petition will be dealt with by us at a later stage of the judgment. In this view also the Receiver had the power to file the petition before the Court for winding up of the Company. There are, therefore, no merits in the first contention.

10. The second contention of the learned counsel is that the Court Receiver is not a "creditor" within the meaning of the relevant sections of the Indian Companies Act. The relevant provisions of the Indian Companies Act read :

Section 433. A company may be wound up by the Court, -

. . . .

(e) if the company is unable to pay its debts.

Section 434(1) A company shall be deemed to be unable to pay its debts -

(a) if a creditor, by assigning or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor.

Section 439. (1) An application to the Court for the winding up of a company shall be by petition presented, subject to the provisions of this section, -

(d) by any creditor or creditors, including any contingent or prospective creditor or creditors.

11. A combined reading of these provisions indicates that unless the Court Receiver is a creditor by assignment or otherwise to whom the company is indebted, he cannot maintain an application u/s 439 of the Indian Companies Act. In support of the contention that he is not such a creditor, strong reliance is placed on the decision in *In re Sacker, Ex parte Sacker* (1888) L.R. 22 Q.B. 179. The facts of that case, as given in the head-note are as follows : In an action in the Chancery Division a receiver was appointed to collect and receive goods comprised in a charge given to the plaintiffs by one of the defendants, including therein any balance of the proceeds of the goods so charged in the hands of the other defendant. An order was subsequently made for the payment by the last-mentioned defendant to the receiver of a specific sum, being money received by him in respect of the proceeds of the goods, and comprised in the charge. The Court of Appeal held that the receiver was not a "creditor" entitled to present a bankruptcy petition against such defendant within the meaning of section 6 of

the Bankruptcy Act, 1883. Lord Esher, M. R., in coming to the said conclusion described the legal status of a receiver thus :

"The petitioner is a receiver. He is not a trustee. There is no debt due to him from the appellant. He could not sue for this sum of money in his own name either at law or in equity. Even if he could by the authority of the Court sue for it in his own name, is the money due to him personally either at law or in equity ? At law it is certainly not. The debt was due to another person for whom he is not a trustee. The money will not be his when he has got it. Would it be his in equity ? I apprehend that he would hold it subject to the authority of the Court, who would deal with it according to the circumstances of the case, but certainly not for his benefit."

12. Fry, L. J., said much the same effect thus :

"There is no debt of any kind due from Sacker to the receiver; consequently he is not a good petitioning creditor, and the petition cannot be maintained."

13. Lopes, L. J., expressed the same idea thus :

"To constitute a good petitioning creditor's debt the alleged debt must be certainly due and payable to the person who presents the petition. There is no debt due to this receiver. He could not maintain an action of debt for this money in his own name."

14. This decision, therefore, goes to the extent of the holding that there is no debt due to a receiver either at law or in equity, that he cannot maintain an action of debt for the money in his own name and that, therefore, he is not a good petitioning creditor. The scope of this decision was explained by the Court of Appeal in *In re Macoun* ILR (1904) K.B. 700. There, on the dissolution of a firm of stock-brokers by the death of one of the partners, the partnership assets, including a debt to the late firm in respect of certain Stock Exchange transactions, were assigned by the surviving partners to L for the purpose of winding up the partnership, and notice of the assignment was served on the debtor. L obtained a decree against the debtor. Thereafter, he commenced an action in the Chancery Division for the winding up of the partnership, and in that action a receiver was appointed of the partnership assets. The receiver took an assignment of the judgment debt from L and obtained leave to issue execution. Thereafter he served a bankruptcy notice on the debtor and ultimately presented a bankruptcy petition against the debtor. The Court of Appeal held that, as the receiver had obtained an assignment of the judgment debt, he was a creditor entitled to present a bankruptcy petition. In the context, when the judgment in *In re Sacker's* case (1888) L.R. 22 Q.B. 179 was pressed upon the Court to come to a contrary conclusion, Vaughan Williams, L.J., had this to say in regard to that judgment :

"In these circumstances it seems to me that we ought not to hold the case of *In re Sacker* (1888) L.R. 22 Q.B. 179 to be an authority for the proposition that a

receiver cannot be a good petitioning creditor even though the state of things is such that he could maintain an action at law. It is plain that Fry L. J. thought that he could; and Lopes L. J. seems to have taken the same view - that is, the view that if the receiver were the holder of a bill of exchange he could be a good petitioning creditor. In the present case the receiver happens to be the assignee of a judgment, and I think that being the assignee of a judgment he can be a good petitioning creditor even though when the money is received it is recovered for the purpose of enabling the Court of Chancery to deal with it."

15. A comparison of these two decisions leads to the following legal position : If a receiver could maintain an action at law or in equity for the recovery of a debt, he would be a good petitioning creditor; and, if he could not, he would not be one. In *In re Sacker's case* (1888) L.R. 22 Q.B. 179 it was not possible for the receiver to bring an action to recover the debt either at law or in equity, whereas in *Macoun's case* ILR (1904) K.B. 700, the receiver, having obtained the assignment of the debt, could maintain an action at law for the recovery of the debt. therefore, even in England a receiver, who can maintain an action to recover a debt, would be a good petitioning creditor. In India, the scope of the receiver's power is governed by the express provisions of the Code of civil Procedure. It is common place that a receiver appointed by court has no estate or interest himself and the scope of his power is defined by the provisions of Order XL of the said Code and the specific orders made by the Court thereunder. He is frequently spoken to as the "hand of the Court". In exercise of the power under the said clause (d) if a court confers upon the receiver power to bring a suit to realise the assets which are the subject-matter of the suit, it cannot be denied that the said receiver can file suits to recover the debts forming part of the said assets. This court in *K.V. Malayya v. T. Ramaswami & Co.* (1963) 2 M.L.J. 110 held that a receiver authorized to file suits to recover debts could institute suits therefore in his own name. In that event, the position of such a receiver is analogous to that of a receiver who can file an action in law or in equity to recover a debt under the English law. If the latter is a creditor in English law in respect of the debt recoverable by him, there is no reason why a receiver empowered to file a suit under Order XL of the CPC cannot be a creditor. In one case there is a voluntary assignment and in the other there is a statutory assignment.

16. The relevant provisions of the Indian Companies Act also lead to the same position. Section 434 speaks of a creditor by assignment or otherwise to whom the company is indebted in a particular sum. Such creditor can file a petition for winding up u/s 439 of the said Act. A creditor, therefore, under the Indian Companies Act is any person who acquires that character by assignment or otherwise. The expression "otherwise" takes in any person to whom another becomes indebted howsoever the relationship of creditor and debtor is brought about between them. We come back to the meaning of the word "creditor". Stroud's Judicial Dictionary, 3rd edition, Vol. I, defines "creditor" to mean a person to whom a debt is payable. Though this is one of the many definitions

given in the said dictionary, this appears to be the appropriate meaning. A receiver appointed by the court to realise a debt can demand the payment of the debt. If the debtor pays the debt to him, he gets a full discharge; in default of payment, the receiver can file a suit in his own name and obtain a decree. After obtaining the decree he will certainly be a judgment-creditor. Such a receiver is a person to whom a debt is payable by the debtor. In the present case, the respondent was authorised to file suits to realise the assets of the joint family, including the debt. We hold that the respondent is a creditor within the meaning of section 439(1)(b) of the Indian Companies Act and, therefore, is competent to maintain the petition for winding up of the Company.

17. It is then contended that the notice issued by the receiver was not in strict compliance with the statutory requirements of section 434 of the Indian Companies Act. Two main defects are pointed out, namely, the notice did not require the appellant to pay the debt to the joint family or the Receiver but to the Additional Collector of Bombay and the said notice put it beyond the reach of the Company to secure or compound for the debt to the reasonable satisfaction of the Court Receiver. Section 434 of the Indian Companies Act has been quoted earlier. Under the section before a Company shall be deemed to be unable to pay its debts two conditions must be satisfied, namely, (i) the creditor shall have delivered a demand in the prescribed manner on the company to pay the sum due to him; and (ii) the company has for three weeks thereafter neglected to pay the same, or to secure or compound for it to the reasonable satisfaction of the creditor. We have already held that the Receiver is a creditor within the meaning of clause (a) of section 434(1) of the Indian Companies Act. In the statutory notice issued by the Receiver he had called upon the Company to make payment of Rs. 25,00,000/- to the Additional Collector of Bombay by whom the debt had been attached within the prescribed period of 21 days. He had to do so because the Additional Collector had served a notice dated July 24, 1956, u/s 46(5)(a) of the Indian income tax Act, 1922, calling upon the Company to pay to him whatever amount was held by the Company on account of the joint family. Section 434(1)(a) of the Indian Companies Act does not say that the demand made by the creditor on the Company shall be to pay the amount due only to the creditor and not to any other person; not does it by necessary implication impose any such condition. What is necessary is that the debtor by paying the amount demanded shall be in a position to get full discharge of his liability. In the present case the receiver directed the amount to be paid to the Additional Collector of Bombay, for the purpose of liquidating the income tax payable by the joint family. Indeed, by paying the said amount, and in view of the notice served on the Company u/s 46(5) (a) of the Indian income tax Act, 1922, the Company will get a full discharge of its liability to the joint family. Section 46(5) (a) of the income tax Act says that any person making any payment in compliance with a notice u/s 46(5) (a) shall be deemed to have made the payment under the authority of the assessee and the receipt of the income tax Officer shall constitute a good and sufficient discharge of the liability of such person to the

assessee. The receiver, therefore, in directing the amount to be paid to the Additional Collector of Bombay, did not do anything in derogation of the provisions of section 434(1)(a) of the Indian Companies Act.

18. Nor are there any merits in the second link of the contention. The question is whether, if proceedings were taken against the company u/s 46(5) (a) of the Indian income tax Act, the company was deprived of the opportunity to pay the sum due to the respondent or to secure or compound for it to the reasonable satisfaction of the creditor within the meaning of section 434(1)(a) of the Indian Companies Act. After the statutory notice the Company could pay the sum demanded or secure or compound for it to the reasonable satisfaction of the creditor. The section does not confer a right on a debtor but only gives him an opportunity to discharge the debt in one or other of the ways mentioned therein. The debtor could secure or compound for a debt only where the circumstances under which the demand is made permit such a mode of discharge. But whereas in this case both the debtor and the creditor were under an obligation to discharge the income tax dues and, as the creditor directed the debtor to pay the entire amount due to him towards the income tax dues, there is no scope for the debtor to approach the creditor for securing or compounding his claim. In this view, no right of the Company is violated, as it has none u/s 434(1)(a) of the Indian Companies Act. That apart, section 46(5) (a) of the Indian income tax Act does not in terms prevent the debtor from compounding his claim with the creditor. It only directs him to hold the money for or on account of the assessee to pay to the income tax Officer. But, if in contravention of the notice issued to him, the debtor pays the said money to the creditor, he will be personally liable to the extent of the liability discharged or to the extent of the tax and penalties, whichever is less. The income tax Officer can also proceed against the debtor, as if the amount in respect whereof the notice was issued was attached by the Collector in exercise of his powers under the proviso to sub-section (2) of section 46 of the Indian income tax Act. These provisions do not prevent the debtor from compounding his claim with the creditor. If he compounds the claim, any agreement entered into by him with the creditor will not affect his liability to pay the income tax of the creditor to the extent covered by the notice issued u/s 46(5) (a) of the income tax Act; but the agreement would certainly be binding between the creditor and the debtor. The income tax Officer has no concern with it. In either view, therefore, the notice cannot be said to have been issued in contravention of the provisions of section 434(1)(a) of the Indian Companies Act. No doubt, courts have held, in our view rightly, that a statutory notice u/s 434(1) (a) of the Indian Companies Act shall strictly comply with the provisions of the said section : see *Japan Cotton Trading Co. Ltd. v. Jajodia Cotton Mills Ltd.* I.L.R. (1926) Cal 345 *Kureshi v. Argus Footwear Ltd.* AIR 1931 Rang 306 and *W.T. Henley's Telegraph Works Co. Ltd. Vs. Gorakhpur Electric Supply Co. Ltd.*, But in this case the statutory notice issued by the respondent did not violate any of the requirements of the section. We, therefore, reject this contention.

19. The next contention is that the appellant had not neglected to pay the sum

to the respondent, as the said amount must be deemed to have been attached by the Collector in exercise of his powers under the proviso to sub-section (2) of section 46 of the Indian income tax Act, 1922. In support of this contention reliance is placed upon *In re European Banking Company : Ex parte Baylis*. There, a petition was presented for winding up of a banking company for a debt of 65 pounds due to the petitioner; but the said debt was attached in the Lord Mayor's Court. The petition was dismissed on the ground that, though the attachment did not absolutely do away with the debt, it seized the debt into the hands of the Lord Mayor's Court. In that case the demand was that the debtor should pay the amount to the petitioning creditor and because of the attachment of that amount by Lord Mayor's Court the debtor could not pay the amount to the creditor. But that judgment cannot possibly be of any help to the appellant, for in the instant case the receiver asked the debtor to pay the amount due to the joint family to the Additional Collector, Bombay, towards the income tax due from the joint family. The debtor was not only not asked to do something which was legally prohibited but was asked to comply with the Collector's requisition u/s 46 of the Indian income tax Act, 1922. By not doing so, the Company clearly neglected to pay the amount within the meaning of section 434 of the Indian Companies Act.

20. Lastly it is argued that there was a bona fide dispute in respect of the liability of the Company to the joint family. It is said that the company's case was that the debt was due to four individuals mentioned in the conveyance, namely, the father and his three sons, whereas the Receiver's case was that the amount was due to the joint family and, therefore, in the circumstances it cannot be said that the Company neglected to pay the amount to the Receiver. In *W. T. Henley's Telegraph Works Co. Ltd., v. Gorakhpur Electric Supply Co. Ltd.*, Allahabad AIR 1936 Au. 840 it was ruled that a mere service of notice of demand of debt by a creditor on a solvent company did not entitle the creditor to a winding-up order if the company bona fide disputed the existence of the debt. In that case it was found that there was a bona fide dispute between the parties and that the notice issued was a vehicle of oppression and an abuse of the process of the Court. But the same cannot be said in the present case. In *In re Gold Hill Mines (1833)* L.R. 83 Ch. D. 210 also a winding-up petition was dismissed on the finding that it was an abuse of the process of the Court, it being a petition to compel payment of a small debt which was under bona fide dispute.

21. In the present case, Narayanlal Bansilal was not only the karta of the joint family but was also the Chairman of the Board of Directors of the Company. In the petition suit he filed an affidavit wherein he stated :

"Referring to paragraph 10(c) of the affidavit I deny there is any manipulation in the balance-sheet of Harinagar Sugar Mills Ltd., as falsely sought to be suggested by the 3rd defendant. No loan of Rs. 25,00,000/- has been given by me to the said company. The said amount is the balance of the purchase price payable by the said company to the joint family in respect of Harinagar Cane

Farm."

22. In view of the said affidavit it is manifest that the alleged dispute was not bona fide but was only a part of a scheme of collusion between the Company and the karta of the joint family. There are, therefore, no merits in any of the contentions raised by the Company.

23. In the result, the appeal fails and is dismissed with costs.

24. Appeal dismissed.