(1982) 09 BOM CK 0010

In the Bombay High Court

Janata Works P. Ltd. (In Liquidation) : Dhanraj G. Bhatia APPELLANT

Vs

Janata Works P. Ltd. RESPONDENT

Date of Decision : 23-09-1982

Acts Referred:
Companies (Court) Rules, 1959 — Rule 11(B)
Companies Act, 1956 — Section 179, 446, 457, 464, 465

Citation : (1984) 56 CompCas 229

Hon'ble Judges : B.J. Rele, J

Bench : Single Bench

Judgement

Rele, J.—The official liquidator has submitted his report for directions whether he should take out a judge''s summons against M/s. Janata Industries for setting aside execution of the eviction decree passed by the court of small causes at Bombay.

2. The company had five galas, viz., Galas nos. 16 to 20 in premises at 162, Tulsi Pipe Road, Lower Parel, bombay. The official liquidator took possession of 4 galas, viz., galas Nos. 16 to 19. He could not take possession of gala No.20 as the occupant of the gala raised a dispute.

3. Prior to the winding-up of the company, the landlord of the said Building, M/s. Janata Industries , Filed a R.A.E. Suit No. 1527/57664 of 1978, against the company for ejectment. On the winding-up of the company, the suit was continued by the landlords after obtaining leave of this court under s. 446 of the companies Act, 1956.

4. In or about july, 1979, there was a fire in the vicinity of the said galas and gala Nos. 16 and 17 were damaged in that fire. The suit, however, was defended by the official liquidator by engaging an advocate. The suit was decreed on July 14, 1982, and the company in liquidation was directed to deliver vacant and peaceful possession of the suit premises of the landlords, viz., M/s. Janata Industries, on or before August 16, 1982. The question of preferring an appeal against the said decree arose and the official liquidator was advised that if any

appeal was to be preferred, he will have to deposit the arrears of rent for the period from September, 1977, to June, 1982, amounting to Rs. 87,000. this the official liquidator found it impossible to do as the company had no fund''s whatsoever to its credit. The official liquidator, therefore, sought directions of the court by his report dated August 10, 1982, whether he should hand over possession of the said gala Nos. 16 to 19 to the landlord. On that report, the official liquidator was directed to give notice to the petitioning creditor. In his resubmitted report dated September 1, 1982, the official liquidator has stated that he was informed that possession of the said gala nos. 16 to 19 was taken by the landlords in execution of the decree through bailiff, on 17th and 18th August, 1982. On the resubmitted report, the question that arose for consideration was whether the landlord could execute the decree without the leave of the court as required by s. 537 of the Companies Act, 1956. The said report was adjourned on the application of Shri K. Dalpatria, the learned advocate appearing on behalf of the petitioning creditor, for tow weeks. In the meantime, the court gave directions to the official liquidator to negotiate with the landlords and, accordingly, the official liquidator on September 16, 1982, the landlords offered to give up the arrears of rent of Rs. 87,000 up to June, 1982, and Rs. 4,500 up to the end of September, 1982. The landlords also offered to pay to the official liquidator rs. 30,000.

5. When the resubmitted report dated September 1, 1982, came up for hearing before me today, Shri. Zaiwala, appearing on behalf of one of the creditors of the company, handed over to me a judge''s summons. I refused to grant leave on ground that no creditor of the company has any locus standi before the court in respect of any matter as regards administration of the assets of a company in liquidation. A creditor has no such right when the company is a going concern and the position does not change when the company is in in the prepossess of winding- up. however, it has been the practices of this court, and which practice is saved by r. 6 of the Companies (Court) Rules, 1959, that the petitioning creditor is given notice in some matters arising in liquidation for his say. But there is no such practice of this court that a creditor of the company has any right of being heard in such matters. It is on this basis that I refused audience of Shri Zaiwala, appearing on behalf of the creditor. I also refused leave to the creditor on whose behalf Shri Zaiwala appeared to take out the judge''s summons.

6. Although, in my opinion, a creditor has no right of hearing, a body of creditors has the right to act with the liquidator. Section 464 of the Companies Act, 1956, provides for appointment of a committee of inspection to inspect the accounts of the liquidator at all reasonable times (s. 465(2)) and the liquidator may call a meeting of the committee as and when necessary (s. 465(3)). Section 464 provides that at the time of the passing of the winding-up order or any time thereafter the court may appoint a committee of inspection to act with the liquidator. It is through the committee of inspection that the body of creditors have a right of audience in matters in respect of a company in liquidation. there

is no committee of inspection appointed in this case and there is no proper application before the court for appointment of the committee of inspection. Shri Zaiwala orally stated that the judge''s summons may be treated as a summons for appointment of a committee of inspection which I did not allow. If an appointment of the committee of inspection is to be made, s. 646 read with rr. 140 and 141 of the Companies (court) rules, 1959, provides for the procedure to be followed for appointment of a committee of inspection. Rule 11 of the said Rules states that the application mentioned in r. 11(a) shall be made by petition and rule 11(b) states that all other applications under the Act or under the shall be made by judge''s summons. Section 464 does not find place in r. (11)(a). Hence the application for appointment of committee has to be made by judge''s summons. there is no such judge''s summons taken out by the creditor on whose behalf Shri Zaiwala appears.

7. Shri K. Dalpatria, on a request to him by Shri Zaiwala, made a very strenuous attempt to have the consideration of the report postponed but he did not give any reason whatsoever for the postponement of the consideration of the report. As already stated, above, at the request of Shri K. Dalpatria, the report was already adjourned for two weeks. Except for wordy disputes which are brought before this court, no concrete proposal has been brought before the court even today by Shri K. Dalpatria in consultation with Shri Zaiwala that the official liquidator will be reimbursed the amount of arrears of rent nor is there any proposal in regard to the compensation to be paid to the official liquidator for the occupation of any of the galas. The only contention raised is that the landlords have not followed the provisions of s. 537 of the Companies Act, 1956, in executing the decree.

8. Shri C. J. Sawant, appearing on behalf of the landlords, has submitted before me that once leave to prosecute the suit has been obtained under s. 446 of the Companies Act, no further leave of the court to execute the decree is required to be obtained. In support of this submissions he has relied upon the decision of the Supreme Court in the case of Bansidhar Shankarlal v. Mohd. Ibrahim [1971] 41 Com cas 21. In that case, the landlord field a suit against the company for a decree in ejectment of the premises occupied by the company as his tenant. The decree was confirmed in appeal. Pending the second appeal, a petition for winding-up of the company was filed and on the winding-up of the company, seconds appeal was prosecuted by the liquidator and the mortgagee. In second appeal, the eviction decree was confirmed. The landlord sought to execute the decree without obtaining leave of the court as required by s. 171 of the Indian Companies Act, 1913, corresponding to s. 446 of the Companies Act, 1956 (hereinafter referred to as "the old act" and "the new act"). The mortgagee filed a petition contending that the application for enforcement of the decree was not maintainable without leave of High Court which ordered the company to be wound up. On a motion being made by the landlord, leave was granted in second appeal to execute the decree. In construing section 171, the Supreme court observed (P. 24) :

"It is intended to ensure that the assets of a company ordered to be wound up by the court shall be administered for the benefit of all the creditors, and that some creditors only shall not obtain an advantage over others by intuiting or prosecuting proceedings against the company. The section is intended to maintain control of the court which had made an order for winding up on proceedings which may be pending against the company or may be initiated after the order of winding up, and the court may remain seized of all those matters so that its affairs are administered equitably and in an orderly fashion."

9. It was further held (p. 24):

"If sanction of the court u/s 179 to prosecute the appeal before the high court was obtained, and it must be so assumed, the contention raised on behalf of Bansidhar loses all significance, for an execution application is only a continuation of the suit and the control of the High court enures drying the execution proceeding also. If the sanction of th court has been obtained for the prosecution of the suit, it would be plainly anises to obtain flesh sanction to the institution of execution proceedings at the instance of successful party."

10. Section 179 corresponds to s. 457 of the new Act. This decision of the Supreme Court shows that once the official liquidator has obtained leave of the court to exercise powers enumerated in sub-s. (1) of s. 457, he can exercise all those powers in the administration of the assets of the company and if once leave to prosecute the suit is obtained, no further leave under s. 446 of the Companies Act, 1956, is necessary for the purpose of exacting the decree.

11. The provisions analogous to the provisions of s. 537 the new Act, viz.,, s. 232 of old Act, have not been considered by the Supreme court in Bansidhar Shankarlal''s case [1971] 41 Com Cas 21. Section 537 of the Companies Act provides for avoidance of certain attachments or execution under the supervision of the court. It states :

"Section 537(1) where any company is being wound up by or subject to the supervision of the court - (a) any attachment, distress or execution put in force, without leave of the court, against the estate or effects of the company, after the commencement of the winding up ; or

(b) any sale held, without leave of the court, of any of the properties or effects of the company after such commencement, shall be void."

12. Once leave to prosecute the suit is obtained under s. 446 of the new Act, no further leave is necessary to be obtained to execute the decree obtained in such a suit. It that be so, s. 537 must necessarily have an application where execution is sought to be levied after the order to winding-up of a decree obtained before the order of winding-up is passed. Section 537 would come into play only in the latter case, viz., in case where a decree has been obtained against the said company prior to its winding-up and the decree is sought to be executed after the winding-up of the company. section 537 is not to be read to mean that if

leave to prosecute the suit is obtained by the plaintiff under s. 446, he must again obtain leave under s. 537 of executions of the decree. The placing of the two sections by the legislature has also to be considered in this respect. Section 446 is placed in Chapter I of Part VII under the sub-heading "Consequences of winding-up order", while s. 537 is placed in Chapter V of Part VII under the sub-heading" Effect of winding-up on on antecedent and other transactions". It is to the antecedent transaction of obtaining of the decree prior to winding-up and execution levied after winding- up s. 537 would apply. Therefore, even on this basis, once leave of the court is obtained by the plaintiff under s. 446 to commence a suit after winding-up or to prosecute a suit already commenced prior to winding-up, no further leave is necessary for executing the decree. Therefore, it is an error to say that the landlords, M/s. Janata Industries, should have obtained further leave of the court of execute the decree and that the landlords not having obtained the leave of the court to execute the decree, the execution levied by them and the consequent possession taken by them of the four galas is void.

13. I have been referred to a decision of the Delhi High Court in the case of Tanwar Finance P. Ltd. In re [1979] 49 Com Cas 827. In that case, the voluntary winding up became subject to the supervision of the court several years ago. There were several decree-holders who had taken out execution proceedings in the Subordinate Judge''s Court of sale of land belonging to the company in liquidation. In one of such proceedings an order was passed with the consent of the voluntary liquidator and the decree-holders, inter alia, that the decree-holders will not sell properties in execution of decrees, without obtaining leave of the court under s. 537 or other relevant provisions in that behalf. In another application for leave under s. 537 of the Companies Act, 1956, it appears that out of the seven petitioners six of them were permitted to take out execution proceedings and to attach the land. Pursuant thereto, the land was sold by public auction. The order granting permission as well as the sale was challenged. It was under these circumstances that the Delhi High Court observed (p. 833):

"Assuming that permission has been given to institute certain proceedings, then the companies Act requires a further permission for purpose of attachment and sale of the property. This is so stated in section 537 of the Act. So, leave from the court has to be sought also under those provisions."

14. This case is distinguishable of facts.

Since it has been held by me that the execution levied by landlord was a proper execution and the landlords having already obtained leave of the court under s. 446 of the new Act to prosecute the suit, no further leave under s. 537 is necessary in such a case to be obtained, the question is whether the possession obtained by the landlords could at all be disturbed. The landlords having obtained possession in execution of the decree by due process of law, such a possession cannot be disturbed, since s. 537 of the Companies Act has no application to the fact of the present case.

15. In the present case, the fact remains that the possession obtained by the landlords cannot be disturbed. On an assumption that such possession can be restored to the official liquidator, on the basis that the landlords have not obtained leave of the court under s. 537 to execute the decree, what would be the effect ? The result would be that the landlords would be called upon the deliver possession back to the official liquidator to such premises and then the landlords would be required to obtain leave of the court to execute the decree and then take possession. there could be no reason whatsoever for the court to refuse leave to execute the decree. The court having once granted permission to prosecute the suit, the court cannot deprive the plaintiffs of the fruits of the decree by refusing leave to execute the decree.

16. In the present case what is necessary to be considered is that there is a heaven liability of Rs. 87,000. by way of arrears of rent up to June, 1982, and a further liability of manse profits to Rs. 4,500 up to September, 1982, at the rate of Rs. 1,500 per month. If any offer for taking the galas on caretaker basis is received by the official liquidator, the official liquidator will first have to pay arrears of rent as well as the accruing rent of Rs. 1,500 per month, with a further payment of Income Tax on the amount which he receives by way of compensation. Taking all these facts and circumstances into consideration, I see no reason to accept the baseless arguments advanced before me by the learned counsel. The company in liquidation will be put to a heavy liability merely because a creditor unfoundedly feels aggrieved.

17. In order, however, to safeguard the interstice of the company, I directed the official liquidator to negotiate with the landlord not merely to give up the heavy arrears of Rs. 87,000, but also to pay to the official liquidator over and above that some amount. In the meeting held before the official liquidator, the landlords agreed to pay to the official liquidator of the company, in liquidation Rs, 30,000. before me the offer has been doubled and the landlords have undertaken to pay to the official liquidator of the company in liquidation Rs. 60,000 within 15 days from to day and to give up all arrears of compensation and not to hold the official liquidator liable in any manner whatsoever or to stake any claim against the official liquidation or against the company in liquidation in respect of any matter whatsoever in respect of the said four galas Nos. 16 to 19. They have also agreed to write a recording letter accordingly as aforesaid.

18. I, therefore direct, the official liquidator not to take any further action in the matter and accept from the landlords Rs. 60,000.

19. The directions on the report are as follows :

Prayer (A) : Yes. But the amount will be Rs. 60,000.

Prayer (B) : Yes. Undertaking will be as stated in para. 14 above.

