

(1964) 11 AHC CK 0026
In the Allahabad High Court
Case No : Special Appeal No. 132 of 1963

Kedar Nath Khetan and Others

APPELLANT

Vs

Lakshmi Devi Sugar Mills (P) Ltd. and Others

RESPONDENT

Date of Decision : 10-11-1964

Acts Referred:

Companies Act, 1956 — Section 398, 399
Income Tax Act, 1922 — Section 46(5A)

Citation : AIR 1966 All 119

Hon'ble Judges : D.S. Mathur, J; B. Dayal, J

Bench : Division Bench

Advocate : V.P. Misra, for the Appellant; R.R. Agarwal, J.N. Tewari and M.N. Shukla, for the Respondent

Final Decision : Dismissed

Judgement

Mathur, J.—This is an appeal by Rai Bahadur Kedar Nath Khetan Gauri Prasad Khetan and Durga Prasad Khetan against the order of the Single Judge, dismissing their application u/s 398 of the Companies Act, 1956, on the ground that it was in view of the provisions of Section 399 of the Companies Act not maintainable. The learned Single Judge was of opinion that the appellants did not hold one-tenth of the issued share capital of the company and had also not paid sums due on their shares. In view of our decision in Special Appeals Nos. 308 to 111 of 1963, decided on 24-5-1963, (Since reported as Maheshwari Khetan Sugar Mills (P.) Ltd. and Others Vs. Ishwari Khetan Sugar Mills and Others, , it shall have to be held that the appellants did hold not less than one-tenth of the issued share capital of the company.

2. The point for consideration, therefore, is if the appellants have not paid all the sums due on their shares; and if so, their application u/s 398 of the Companies Act shall not be maintainable till they have paid all such sums.

3. For the disposal of the appeal, it is not necessary to give the post history or the disputes between the parties to the appeal. The total issued share capital of

the company, namely, the Lakshmi Devi Sugar Mills (Private) Limited, Chhitauni respondent No. 1, is Rs. 12,61,500, and the value of the shares registered in the names of the appellants is to the tune of Rs. 2,29,500. Before the learned Single Judge the respondents had given the figure of Rs. 14,413.39 paise as the amount due from the appellants and hence on their shares. The respondents had produced the account books of the company, but did not lead any evidence to prove the items due from the appellants. In the interest of justice we considered it necessary to record additional evidence of the parties; and the respondents were, in the first instance, called upon to give a statement of the sums due to the company from the appellants and hence on their shares, and they did file a Statement of the sums due on 26-9-63. The appellants were thereafter to submit their objections to this Statement, and they did so by filing an objection in the form of an affidavit of Jai Narain Bajpai Secretary to Rai Bahadur Kedar Nath Khetan. In this affidavit only four items were challenged and in addition it was pleaded that Smt. Jamuna Devi wife of Rai Bahadur Kedar Nath Khetan was a member of the joint Hindu family and a sum of Rs. 11,270.47 paise payable to her, was to be adjusted towards the amounts due from the appellants. It was also pleaded that dividend to the tune of Rs. 33,000 was payable to the appellants which stood to their credit and was to be adjusted towards the amount due from them. The four disputed amounts are of Rs. 2,600, Rs. 737.16 paise Rs. 182.45 paise and Rs. 6,425, totaling Rs. 9,944.61 paise.

4. In accordance with the Statement prepared and submitted in Court by the company, the amounts due from the appellants come to:--

Rs.

1.

In the name of M/s. Maheshwari Agricultural Farm Barhya

94.44

2,

In the name of Khetan (Naraipur) Agricultural Farm Naraipur

16,991.76

3.

In the name of Khetan Agricultural Farm Khutai

1,007.78

Total

18,093.98

5. The respondents examined before us and witnesses, namely, Suraj Prakash Sabherwal the present General Manager of the respondent company, Kailash Pati

Gadia now working as Office Superintendent, Kalyan Singh, Incharge of the Watch and Ward Department, and Kailash driver.

6. The appellants examined Smt. Jamuna Devi on commission and led no other evidence. None of the appellants, not even Rai Bahadur Kedar Nath Khetan were examined to controvert the statements made by witnesses examined on behalf of the respondents.

7. With regard to the last item of Rs. 6,425 Suraj Prakash Sabherwal made a statement in clear words that this amount was paid to Raghunath Maharaj through Kailash Pati Gadia on 13-8-1960 to be debited to the cane advance account of Khetan Agricultural Farm, Naraipur after Rai Bahadur Kedar Nath Khetan who was then in Chhitauni had confirmed that the amount be paid to Raghunath Maharaj on his behalf. Ex. R-5 is the cash voucher and Ex. R-6 the pay order pertaining to this amount. Nothing has come out in the cross-examination of this witness and also of other witnesses which may show that the amount was not paid under instructions of Rai Bahadur Kedar Nath Khetan as an amount payable by him, of course, towards the Khetan Agricultural Farm Naraipur. In spite of the opportunity given Rai Bahadur Kedar Nath Khetan did not have the courage to make a statement on oath that what the witnesses were deposing was not true. It is thus proved that this sum of Rs. 6,425 was payable by the appellants under the account of Khetan Agricultural Farm, Naraipur belonging to them.

8. As is proved from the statement of Suraj Prakash Sabherwal the second and third items of Rs. 737.16 and Rs. 182.45 paise were paid to him as liquidator of Ganga Devi Sugar Mills to be debited to the account of Khetan Agricultural Farm, Naraipur. This was also done under instructions of Rai Bahadur Kedar Nath Khetan who was that day (25-6-1960) present in Chhitauni. From the statement of Suraj Prakash Sabherwal and also from the papers on record it is clear that this was not the solitary instance of the amounts being withdrawn to the account of Khetan Agricultural Farm, Naraipur. We have no hesitation in accepting the statement of Suraj Prakash Sabherwal all the more when Rai Bahadur Kedar Nath Khetan has made no statement on oath to controvert the statement of the witness.

9. We have no hesitation in recording a finding that the above three items were withdrawn under the instructions of Rai Bahadur Kedar Nath Khetan and they are payable to the company by the appellants. In the circumstances, it is not necessary for us to record any finding with regard to the fourth item of Rs. 2,600 and also whether the appellants and Smt. Jamuna Devi are members of a joint Hindu family and the amount of Rs. 11,270.47 paise payable to her is adjustable to the account of the appellants. Even if the sum of Rs. 2,600 is held not to be payable by the appellants and the amount of Rs. 11,270.47 paise is to be adjusted towards the appellants' accounts, the sum due from the appellants to the company shall be Rs. 18,093.98 less Rs. 2,600 less Rs. 11,270.47 paise that is, Rs. 4,223.51 paise.

10. The points for consideration, therefore, are:--firstly, whether the amount of Rs. 33,000 towards dividend is payable to the appellants and they deserve to be given credit of this amount, and secondly, if the amount due from the appellants is in the eye of law an amount due on their shares. Another point to be looked into in this connection shall be whether the lien exists on all the shares or only such shares which are sufficient to meet the liability.

11. From the affidavits on record it is apparent that huge sums of Income Tax arrears were payable by the various firms of the Khetans and also by the various members individually and by their respective Hindu undivided families. The Income Tax Officer issued a notice in the year 1950 u/s 46(5-A) of the Income Tax Act and in the year 1953 the Collector of Bombay appointed a Receiver in execution of the recovery certificates issued by the Income Tax Officer. The Receiver took possession of the properties mentioned in the order, and the Receiver also took into possession other properties belonging to the dissolved firms of the Khetans. Relying upon the assertion contained in para 5 (i) of the counter affidavit of Vishwanath Prasad Tulsiyan and Ram Ratan Das Kedia it was urged that the respondents' case was that there was attachment of shares and the dividends under Order 21, Rule 46, C. P. C. when in fact there was no such attachment. This contention is based upon a reading of one assertion in isolation, and not on consideration of the counter affidavit as a whole which would show that the attachment was in pursuance of the notice u/s 46(5-A) of the Income Tax Act. This was made clear in para 5 (h) of the above counter affidavit. This is also apparent from Resolution No. 13 of the minutes of the meeting of the Board of Directors of Lakshmi Devi Sugar Mills (Private) Limited, Chhitauni held at its registered office at Chhitauni on April 5, 1952, and also Resolution No. 7 of the minutes of the meeting held on October 3, 1959. The minutes of both the meetings were annexed to the rejoinder affidavit filed by and on behalf of the appellants. The fact that the Income Tax Officer had issued notices u/s 46(5-A) of the Income Tax Act is also proved from para 43 of the rejoinder affidavit of the appellants.

12. This naturally leads us to the consideration of the effect of a notice u/s 46(5-A) of the Income Tax Act, whether after the issue of the notice the dividend is still payable to the share-holders, and if not paid, can the dividend be adjusted to their accounts. Sub-section 5-A of Section 46 of the Income Tax Act runs as below:--

"(5-A) The Income Tax Officer may at any time or from time to time, by notice in writing (a copy of which shall be forwarded to the assessee at his last address known to the Income Tax Officer) require any person from whom money is due or may become due to the assessee or any person who holds or may subsequently hold money for or on account of the assessee to pay to the Income Tax Officer, either forthwith upon the money becoming due or being held or at or within the time specified in the notice (not being before the money becomes due or is held) so much of the money as is sufficient to pay the amount due by the

tax-payer in respect of arrears of Income Tax and penalty or the whole of the money when it is equal to or less than that amount.

The Income Tax Officer may at any time or from time to time amend or revoke any such notice or extend the time for making any payment in pursuance of the notice.

Any person making any payment in compliance with a notice under this sub-section 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 to the extent of the amount referred to in the receipt.

Any person discharging any liability to the assessee after receipt of the notice referred to in this sub-section shall be personally liable to the Income Tax Officer to the extent of the liability discharged or to the extent of the liability of the assessee for tax and penalties, whichever is less.

If the person to whom a notice under this sub-section is sent fails to make payment in pursuance thereof to the Income Tax Officer, further proceedings may be taken by and before the Collector on the footing that the Income Tax Officer's notice has the same effect as an attachment by the Collector in exercise of his powers under the proviso to Sub-section (2) of Section 46.

Where a person to whom a notice under this sub-section is sent objects to it on the ground that sum demanded or any part thereof is not due to the assessee or that he does not hold any money for or on account of the assessee, then nothing contained in this section shall be deemed to require such person to pay any such sum or part thereof, as the case may be, to the Income Tax Officer."

13. On receipt of the notice u/s 46(5-A), it is necessary for the person, from whom money is due or may become due to the assessee, or who holds or may subsequently hold money for or on account of the assessee, to pay the Income Tax Officer either forthwith upon the money becoming due or being held or at or within the time specified in the notice so much of the money as is sufficient to pay the amount due by the tax-payer in respect of arrears of Income Tax and penalty or the whole of the money, when it is equal to or less than that amount. It is not in dispute that Income Tax arrears exceed the amount of the dividend. Any account paid by the person in compliance with the notice is, in the eve of law, an amount paid under the authority of the assessee; and if the person discharges any liability to the assessee after receipt of the notice shall be personally liable to the Income Tax Officer to the extent of the liability discharged or to the extent of the liability of the assessee for tax and penalties, whichever is less.

14. It is thus clear that after the receipt of the notice the respondent company could not pay the dividend to the appellants: the account of the dividend was to be paid to the Income Tax Officer towards the arrears of Income Tax and

penalties due from them, though the company could retain the amount of dividend till further orders of the Income Tax Officer. When the dividend was not payable to the appellants, it could not be treated as an amount due to them nor could it be adjusted towards any amount due from them.

15. The other effect of the notice is that further proceedings can be taken by and before the Collector on the footing that the Income Tax Officer's notice had the same effect as an attachment by the Collector in exercise of his powers under the proviso to Sub-section (2) of Section 46 of the Income Tax Act. The attachment shall be deemed to be under Order 31, Rule 46 of the Code of Civil Procedure. In other words, it is not necessary that there should be actual attachment under Order 21, Rule 46 C. P. C. The Income Tax Officer's notice alone has the effect of such an attachment. Admittedly the Income Tax Officer had issued a notice u/s 48(5-A) of the Income Tax Act and thereafter the dividends also stood attached as if there was an attachment under Order 21, Rule 46 C. P. C. The dividends though payable to the appellants in the absence of the notice shall have to be disregarded while determining whether any sum was due on the shares of the appellants.

16. In ground No. 25 of the memo of Appeal, it was mentioned that there was no attachment of 110 shares, but this point had not been raised before us, may be because even after giving credit of the dividend due on these shares, there was still an amount due on the shares registered in the names of the appellants.

17. Before making comments on the other arguments put forward on behalf of the appellants it shall be proper to briefly indicate what is contemplated by the restriction imposed by the proviso to Clause (a) of Section 399 of the Companies Act. The right to apply u/s 397 or 398 of the Companies Act remains in abeyance for so long as the applicant or applicants have not paid all calls and other sums due on their shares. The shares have been fully paid up and no question of payment of calls arises. However, the general words "other sums" must have reference to any sum other than the amount of the calls due on the shares. When the legislature has used general words, the Courts or law shall not be justified in restricting their scope on the supposed intention of the legislature, on the presumption that certain words were, due to drafting error, omitted. The words "other sums" shall thus include any amount due from the share-holder other than the amount of calls, provided that such amount is due on the shares, that is, can be recovered by the sale of such shares.

18. The above discussion covers the first point which was raised on behalf of the appellants. The contention was that the above proviso to Section 399 of the Companies Act pertains to statutory liability, and not any private loan or advance. Considering that the Courts cannot add words to an enactment and the general words, for so long as they are clear and unambiguous and are capable of one interpretation, must be given their general meaning, of course, as mentioned above, it is necessary that a charge should exist on the shares before an amount due from the share-holder shall debar him from making an application u/s 397 or

398 of the Companies Act.

19. The second point contended is that under Article 12 of the Articles of Association of the Lakshmi Devi Sugar Mills (Private) Limited. Chhitauni a Company's lien exists upon the shares registered in the name of the debtor shareholder out the lien cannot amount to an equitable charge and, consequently, the amount due cannot be deemed to be a sum due on the shares. Apparently, this contention is based upon certain observations made in the cases of *Albert Judah Judah Vs. Rampada Gupta and Another*, and *The Bank of India, Ltd. Vs. Rustom Fakirji Cowasjee*,

20. Articles 12 to 14 of the Articles of Association of the Company make it clear that there exist not only a lien but also an equitable charge on the share registered in the name of a member whether solely or jointly with others. These Articles run as below:--

"LIEN

12. The company shall have a first and paramount lien upon all the shares registered in the name of each member, whether solely or Jointly with others, and upon the proceeds or sale thereof for his debts, liabilities and engagements, solely or jointly with any other person to or with the Company whether the period for the payment, fulfillment or discharge thereof shall have actually arrived or not and no equitable interest in any shares shall be created except upon the footing and condition that this clause is to have full effect. And such lien shall extend to all dividends from time to time declared in respect of such shares. Unless otherwise agreed the registration of a transfer of shares shall operate as a waiver of the Company's lien if any, on such shares.

13. For the purpose of enforcing such lien the Directors may sell the shares subject thereto in such manner and within such period as they think fit, but no sale shall be made until such period as aforesaid shall have arrived and until notice in writing of the intention to sell shall have been served on such member, his executors or administrators, and default shall have been made by him or them in the payment, fulfillment or discharge of such debts, liabilities or engagements for seven days after such notice.

14. The next proceeds of any such sale after payment of costs of such sale shall be applied in or towards satisfaction of the debts, liabilities or engagements due to the Company and the residue (if any) paid to such member, his heirs, executors, administrators, committee, curator or other representatives."

21. Article 12 merely lays down that the Company shall have a first and paramount lien upon all the shares registered in the name of each member, and such lien extends to all dividends from time to time declared in respect of such shares. It is under Article 13 that the Directors can, for the purposes of enforcing the lien, sell the shares after giving notice to the share-holder or his executors or administrators, and as provided in Article 14, the sale proceeds after payment of

costs of the sale can be applied in or towards satisfaction of the debts, liabilities or engagements due to the company. The company's lien thus does not merely extend to the retention of the shares, but amounts to an equitable charge with a right to the Directors of the Company to sell the shares in accordance with Article 13 of the Articles of Association. When the shares can be sold for the recovery of any amount due from the share-holder, in other words, there exists an equitable charge upon the shares, the amount due from the share-holder is an amount due on his shares.

22. In *Albert Judah Judah Vs. Rampada Gupta and Another*, it was observed that "lien at law" merely meant the possessor lien on the share scripts recognised by the law in this country and understood by all. This finding was recorded on consideration of Articles 16 and 17 of the Articles of Association of that Banking Company. However, Hon^{ble} Mallick J. had clearly observed in an earlier part of the judgment that the word "lien" has a more comprehensive meaning to include "equitable charge" as well cannot and indeed has not been disputed. (See the case of *Everit v. Automatic Weighing Machine Co.* (1892) 3 Ch 506 ; In re, *National Bank of Wales Ltd.* (1899) 2 Ch 629 ; and In re. *General Exchange Bank* (1871) 6 Ch A 818; but in view of the use of different words in Articles 16 and 17 of the Articles of Association of the Banking Company hold that a distinction must be made between "lien" and "equitable charge" and in accordance with the Articles of Association only the shares in which the Company had equitable charge could be sold under Article 17. In *(S). The Bank of India, Ltd. Vs. Rustom Fakirji Cowasjee*, it was, on the other hand, observed that lien is

"neither a "jus in rem" nor a "jus ad rem" but simply a right to possess and retain property until some claim attaching to it is satisfied or discharged,"

and that

"such exceptional liens apart, the general rule may be stated to be that a lien whether an offspring of statute or arising by any usage of custom is essentially a right of retention."

It was, however, observed that by usage or custom of trade the lien may confer an additional right to bring the property to sale,

23. For purposes of the present appeal it is not necessary to lay down whether a lien merely confers the rights of retention or also the right of sale, that is, equitable charge, but one thing is clear that where under the contract the shares can be sold in realization of the amount due, there exists an equitable charge also. Consequently, the shares in question could be sold in realization of the amount due from the appellants and the amount was due on their shares.

24. Articles 12 to 14 of the Articles of Association are not in any manner repugnant to the provisions of the Companies Act. Regulations 9 and 10, contained in Table A of Schedule I of the Companies Act, 1956, entitle the Company to lay down that it shall have a first and paramount lien on every share

and the Company can sell the shares on which it has a lien. This point was raised in the Memo of Appeal, but apparently was given up during the hearing.

25. The next point contended is that the company's lien under Article 12 of the Articles of Association of the Company can be on such shares as are sufficient to meet the liability and cannot extend to all the shares belonging to the appellants and registered in their names, whether solely or jointly with others. In this connection it was mentioned that the shares held by the appellants were of the face value of Rs. 2,29,500/- and the sum alleged to be due from the appellants does not exceed Rs. 18,000/- and odd. The appellants are bound by Articles 12 to 14 of the Articles of Association of the Company. Article 12 clearly lays down that the Company shall have a first and paramount lien upon all the shares registered in the name of each member, whether solely or jointly with others and no equitable interest in any share shall be created except upon the footing and condition that the above clause is to have full effect, namely, that the company has the first lien on all the shares. When the Hen exists on all the shares of the appellants, they cannot take advantage of the fact that the face value of the shares far exceeds the liability. In the eye of law, a sum is due on all the shares of the appellants and for so long as the liabilities are not discharged in full, the bar imposed by Section 399 of the Companies Act shall remain in force.

26. It was half-heartedly contended that after the transfer of certain shares and registration thereof in the names of the appellants, the company shall be deemed to have waived the lien and such shares shall stand free of encumbrances entitling the appellants to seek remedy under Sections 397 and 398 of the Companies Act without payment of any amount which may otherwise be due from them. This contention has, in our opinion, no force. The last sentence of Article 12 quoted above provides that unless otherwise agreed the registration of a transfer of shares shall operate as a waiver of the Company's lien, if any, on such shares, which would mean that if the shares were originally held by a person "A", and they were transferred to another person "B", after the registration of the transfer of shares, the Company's lien as existing on the shares shall not be enforceable as against "B" and since after the transfer the shares shall be held by "B" free of the lien. But where the person "IV is indebted to the Company and more shares are registered in his name, all the shares including the new ones shall be those which are registered in his name and the Company's lien shall, in view of Article 12, extend to the new shares also.

27. The last point contended on behalf the appellants is that the amount due from the appellants could not be ascertained without accounting and hence no sum could be said to be due from them, nor due on their shares, till there was a final accounting. Whether accounting is or is not done, the liability exists and is enforceable though the amount due can be determined after accounting only. The proviso to Section 399 of the Companies Act has been worded generally and shall cover a liability even though the exact amount has not been determined or adjudicated upon. A similar view was expressed in *Gaya Din and Others Vs.*

Jhuman Lal and Others, though in a somewhat different connection. It was held that money became due as it was legally recoverable quite irrespective of when the suit was instituted. The amount is legally recoverable even before an accounting is done, with or without the intervention of the Court, and consequently on the application of the above rule the amount becomes due even though no steps for its determination have been taken.

28. To sum up, on the date the appellants moved the present application u/s 398 of the Companies Act, they were indebted to Lakshmi Devi Sugar Mills (Private) Ltd., Chhitauni and the company's lien extended to all the shares held by the appellants. The appellants had not paid all the sum due on their shares and as laid down in the proviso to Clause (a) of Section 399 of the Companies Act, they had no right to apply u/s 398 till such time as the sums due were not paid. The learned Single Judge thus rightly held that the present application u/s 398 of the Companies Act was not maintainable.

29. The Special Appeal has no force and it is hereby dismissed with costs.