
(1933) 05 CAL CK 0033
In the Calcutta High Court

Nabin Kishori Choudhurany	Vs	APPELLANT
Jagneswar Sanyal and Others		RESPONDENT

Date of Decision : 08-05-1933

Acts Referred:

Companies Act, 1956 — Section 153

Citation : AIR 1933 Cal 809

Hon'ble Judges : Mitter, J;Henderson, J

Bench : Full Bench

Judgement

Mitter, J.—(In No. 66). This is an appeal on behalf of the Pabna Dhanabhandar Co. Ltd. (in liquidation) against the order of the Subordinate Judge of Pabna dated 18th September 1930 by which he disallowed an objection of the appellant to the assignment of a decree made by the said company in favour of the respondents. A preliminary objection has been raised to the hearing of this appeal. In order to understand the soundness or otherwise of the preliminary objection it is necessary to state a few salient facts. The Pabna Dhanabhandar Co. Ltd., had a decree against the judgment-debtor Nobinkishori Chaudhurani and another. The respondents had certain deposits in the company. On 5th June 1929 they conveyed the decree to Jagneswar Sanyal, the respondents to the present appeal. On 8th. July 1929 an application was made by one of the creditors of the bank for winding up. On 18th November 1929 the High Court, on its original side, passed the winding up order. On 5th July 1929 the respondents assignees applied to execute the decree. The petition for execution is to be found at pp. 35 and 37 of paper-book in M.A. 26 of 1931. The liquidators of the bank put in a petition of objection to the assignment (see p. 1 of paper book 66 of 1931) and a miscellaneous case was started. The objection in substance was that the transfer was a fraudulent preference and is not valid.

2. The Subordinate Judge negatives this objection of the liquidators and it is against that order that the present appeal has been brought. It is said that there is no appeal to this Court as the question arises between the decree-holder and

his representative. The appellant contends that Section 47, Clause 3, Civil P.C., is wide enough to cover such a question and an appeal would therefore lie. The respondent has relied on several cases in support of the preliminary objection. There is a decision of Sir Lawrence Jenkins in the case of Magan Lal v. Doshi (1901) 25 Bom 631, where the learned Chief Justice of Bombay was of opinion that a question between the judgment-debtor and his representative is not a question between the party in suit and his representative within the meaning of Section 244 of the Code of 1882. A similar view has been taken by Banerjee, J., in Bhagabati v. Banwari Lal . On the oth(1909) 31 All 82er hand the appellant has relied on a decision of the Madras High Court in the case of Bommanapati v. Chintakunta (1903) 26 Mad 264 in support of the opposite view. It is not necessary to decide finally on the preliminary objection as \\\va are of opinion that the appeal should fail on the merits.

3. It appears that by a resolution of the share-holders and depositors of the company passed on 28th February 1926 it was resolved by the majority that if a depositor happens to be a debtor then the said sum may be set off and that the bank should not go into liquidation and that every attempt will be made to sell it. On 7th March 1926 there was another resolution in a special general meeting of the share-holders and depositors of the Pabna Dhanahhandar Co. Ltd., and it was resolved by a majority that any depositor shall be competent to have his dues set off against the debt of any debtor, and on 14th March 1926 at a meeting of the directors this resolution was confirmed. It is argued by the appellant that an attempt by the directors and depositors of making an arrangement or set-off can only be done u/s 153, Companies Act. This special procedure was not followed in the present case and that therefore the resolutions are ultra vires.

4. It is to be noticed however that this objection was not taken in the petition of objection of the liquidators and nothing was said with regard to the regularity or otherwise of the meetings of the bank. We are unable therefore to give effect to this objection raised for the first time in appeal. If the objection had been taken in the Court below some answer might have been forthcoming. The meetings of the share-holders were convened with notice to all the share-holders and if some of them did not choose to appear they must be held to be bound by the resolutions passed by the majority. It is next argued that the assignment is hit by the provisions of Section 231, Companies Act, and must be deemed to be a fraudulent preference.

5. The test of fraudulent preference has been laid down authoritatively in several decisions and it is said that the use of the word "preference" implies an act of free will and that would by itself make it necessary to consider whether pressure had or had not been used: see Sharp v. Jackson (1899) AC 419. It has been argued in this case that the Subordinate Judge was wrong in holding that there was pressure from the creditors, seeing that the notice given on 9th January 1929 (Ex. E) referred to a realization of current deposits and deposits without interest of much smaller sum than Rs. 23,000 for which the assignment of the

decree was made, and that a fixed deposit for two years of Rs. 5,000 had not become due on 14th May 1929, the date of Ex. B. The test is whether there was an overriding intention to prefer one particular creditor or creditors even if the bank had committed the mistake of making the assignment in favour of a particular creditor under the impression that unless that particular creditor was paid the company would go into liquidation. It cannot be said that the act was done by the company's free will and volition. We are of opinion therefore that the Subordinate Judge was right in holding that there was real pressure when the company made the assignment as opposed to colourable pressure.

6. The test is, as has been laid down by the Privy Council in a recent case of *Sime Darby & Co. v. Official Assignee* AIR 1928 PC 77 that where the proper inference to draw from the facts was that the dominant motive actuating the debtor was that, in making the transfer to his creditor he, the debtor, was doing what he felt himself bound or compelled to do, the case is not of fraudulent preference within the statute. Here the object of the company was to save the company from liquidation. For all these reasons the appeal must be dismissed. There will be no order as to costs.

7. Appeal from Original Order No. 26 of 1931. This appeal is on behalf of the judgment-debtors and arises out of proceeding taken in connexion with the assignment of a decree with reference to which the facts have been stated in the judgment which we have just delivered in appeal from Original Order No. 66 of 1931. It is not therefore necessary to recapitulate the facts in this appeal. The objections taken on behalf of the judgment-debtors are three in number. In the first place it is contended that the proceedings relating to the execution should not have been allowed to go on in view of the provisions of Section 171, Companies Act, which requires that leave must be obtained after a winding up order has been made to commence any suit or other legal proceeding against the company. It is contended on behalf of the judgment-debtors that such leave not having admittedly been obtained the execution proceedings cannot go on. It appears however that this objection was not taken by the judgment-debtors in the Court of first instance and this objection, in our opinion, does not lie in the mouth of the judgment-debtors. The objection was taken by the Pabna Dhana Bhandar Co. Ltd. (in liquidation) but was disallowed by the Court of first instance. Whether it was abandoned or not it does not appear, but it was not pressed in this Court by the Pabna Dhana Bhandar Co. Ltd. (in liquidation). It would not be right in our view that the judgment-debtors not having taken the point in the Court below should be allowed to raise this contention now. The irregularity complained of is an irregularity in the matter of procedure and it does not matter to the representatives of the judgment-debtors whether they pay the money to the Pabna Dhana Bhandar Co. Ltd., or to their assignees. There is therefore no substance in this objection.

8. The second objection turns on the construction of the compromise decree at p. 4 of the paper-book. It is argued that as no time was given for the payment of

the second and the third instalments of Rs. 6,663 and that in these circumstances the decree should be liberally construed, and it should be held that those sums have not yet become due, that would be a very unreasonable construction, to put upon the decree. The decree recites that the plaintiff will receive in four equal instalments a sum of Rs. 6,663 the first instalment being payable in December 1928 and the last instalment in December 1931. It is obvious that what was intended was that the other two instalments were payable in December 1929 and in December 1930 respectively and the execution proceedings have been started in July 1930 after the third instalment had fallen due. There is therefore no substance in this objection and it was not even raised in the Court below. It was admitted that the third instalment fell due.

9. The last objection is founded on the provisions of Section 67, T.P. Act, read with Section 99, as it stood before the amendment of the act by which Section 99 was repealed. It is said that from the provisions of para. 4 of the consent decree at p. 4 of the paper book it is clear that the execution proceedings could not terminate in the sale of the properties mentioned in para. 4 unless a suit was brought as contemplated by Section 67. This point was not taken in the Court below nor was it taken originally in the grounds of appeal, but that ground was served on the respondent only a short time before the hearing of the present appeal. It appears clear also from para. 3 of the petition of compromise at p. 4 of the paper book that there was a distinct provision that the plaintiff would be at liberty to proceed against the defendants by executing the decree. There does not seem to be any substance in this objection. The result is that all the three objections urged in this appeal fail and the appeal must be dismissed with costs. The respondents are entitled to get costs from the judgment-debtors appellants. We assess the hearing fee at five gold mohurs.

Henderson, J.

10. I entirely agree.